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Supreme Court, U.S.
OCT 29 1993

No. 93-400

IN THE

Supreme Court of the United States

October Term, 1993

NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

against

BERNARD McCUMMINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF TO BRIEF IN OPPOSITION

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Dated: October 29, 1993

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REPLY BRIEF TO BRIEF IN OPPOSITION

Statement of the Case

Respondent's brief stands as monument to distortion and deception. Respondent argues that the Fourth Amendment *Garner* claims disappeared before the end of the trial and played no role in the jury's finding against petitioner. The simple response to this argument is that it is plainly and palpably false. Respondent cannot explain why the trial court decided to *charge Garner* as *controlling* if the Fourth Amendment question had long become moot (Pet. 82a-86a). He cannot explain the *post-trial* colloquy during which the trial court insisted that it had fully explained to the jury that *Garner* controlled the suit (Pet. 87a). He cannot explain why *no* portion of his own request to charge makes the slightest reference to negligence, nor why both the Appellate Division majority and dissent felt that *Garner* controlled, if the Fourth Amendment question had long since disappeared.

Simply put, if negligence played *any* part in this lawsuit, respondent would have provided this Court with *reproduced evidence* from the trial that it did.

Now it is true that respondent makes numerous references to the trial record, references which he assures this court prove negligence figured prominently at trial. Again, the simple response to those assertions is that respondent is not telling the truth. In this reply ("P.Rep."), petitioner has reproduced those excerpts (P.Rep. 172a-203a); to the extent they are relevant—and most are not—they convincingly show that the parties and trial court agreed that the sole standard the jury was to apply in determining whether the shooting was justified was *Garner's*. It is not too strong to say that some of respondent's assertions, specifically the claim on p. 8 that the trial court ruled that it would submit the case on negligence grounds, go beyond distortion and border on falsehood.[1]

In short, the jurisdictional inquiry this Court must conduct is a simple one. If respondent's account is true, then this Court lacks

[1]Respondent is guilty of another falsehood in Footnote 8 where he asserts that petitioner has paid him the judgment. Of course, this (Footnote continued on next page.)

jurisdiction to hear Point I. After examining this reply and exhibits, the Court should have little difficulty in finding that it has jurisdiction to hear the *Garner* point.

Contrary to respondent, this Court also has jurisdiction to hear the due process claim. First, there is strong reason to doubt that petitioner was required to point out to the Court of Appeals, the very body which had unexpectedly deprived it of due process that it had acted in violation of fundamental fairness. *See Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 85-87, fn.9 (1980). In fact, petitioner alerted the Court of Appeals to the due process violation, in an extensive motion for reargument and rehearing (*see* App. L). The bowdlerized version of the motion which respondent has reproduced does not do justice to the Authority's position. Thus, this Court has the power to pass on the due process claim, a claim which arises out of the Court of Appeals' challenge to this Court's role as the ultimate constitutional law decisor.

ARGUMENT

POINT I

The suit was decided solely on *Garner* grounds. Hence this Court has jurisdiction to decide this suit, and correct the Court of Appeals' error.

The task before this Court is engagingly simple. The Court has before it respondent's trial memorandum (Pet. 69a), his request to charge (Pet. 73a), *the charge the trial court actually read to the jury* (Pet. 82a-86a), the colloquy between counsel and the trial judge *after* the jury had retired (Pet. 87a), and the jury's request for clarification of *Garner* (Pet. 87a-88a). If this case was decided on common law negligence grounds, this Court aided by respondent, should have no trouble finding proof of it. No such proof can be found, because no such proof exists.

(Footnote continued.)
Court's jurisdiction would not be affected even had the judgment been paid (*see e.g. Porter v. Lee*, 328 U.S. 246, 251 [1946]; *Bank of Marin v. England*, 385 U.S. 99 [1966]). In fact, the Authority is currently holding approximately $1.7 million of the *McCummings* judgment which is tied up in unrelated litigation.

Now respondent in his brief on page 8 points to one carefully doctored exchange from the record to argue that negligence was submitted to the jury: "I will put it to the jury just as we do in any negligence case . . . Was the defendant negligent?" The "quote," however, does not say what counsel says it does. What the quote actually reflects is the following.

During the trial, petitioner asked the trial court to submit to the jury special interrogatories outlining the different factual scenarios of the shooting (*see* P.Rep. 147a, 201a-203a). The court responded that it would submit interrogatories "just [like] in a New York negligence case" where, typically, the jury answers a single question, i.e.: 'was defendant negligent?'[202a] The actual interrogatory the jury was given here reflects the court's decision (P.Rep. 144a-145a). The jury below was simply asked to decide whether Officer Rodriguez was justified in shooting McCummings. Tellingly, too, the verdict sheet says nothing of "negligence". In short, the excerpt has *nothing to do* with the theory under which this suit was tried. To argue that it does borders on dishonesty.

Again, on pp. 8-9 respondent cites to numerous record references—1153-1172 *[P.Rep. 172a-183a]*, 1646-1649*[P.Rep 183a-185a]*, 1656-1657 *[P.Rep. 186a-187a]*, 1665-1666 *[P.Rep 188a-190a]*, 1674-1687*[P.Rep. 192a-200a]*, 1695-1696 *[P.Rep. 201a-203a]*, 1882-1897*[P.Rep. 82a-86a]*—to argue that (1) negligence was the key to this suit and (2) that whenever someone at trial spoke about "justification," they were actually referring to common law negligence. The cited portions have been reproduced here as App. X (P.Rep. 172a). Once again, the excerpts do not say what respondent pretends they do.[2] To the extent these record excerpts are relevant at all, they show the parties agreed

[2]The most charitable thing one can say about the author of respondent's brief is that he is unfamiliar with the trial record. PP. 1153-1172 contains irrelevant colloquy about petitioner's 1986 rules which the trial court withdrew because they did not apply when the 1984 McCummings shooting took place. The colloquy then wanders off into an aimless discussion of petitioner's other internal rules governing Rodriguez' conduct in 1984, which the trial court thought did not address whether deadly force could be used against a fleeing felon and which, in any event, were more lenient than *Garner*. PP. 1646-1649 and 1656-1657 contain an irrelevant discussion about whether the Authority was negligent in training Officer (Footnote continued on next page.)

that the question of justification was to be measured by *Garner's* Fourth Amendment standard and no other.

As noted, respondent argues that when the parties debated whether Rodriguez acted "reasonably" or "justifiably" in firing his gun they were debating about negligence. Besides being factually wrong, respondent's assertion proves too much. Under respondent's reasoning *Garner* itself can be classified as a "common law negligence" case because this Court analyzed police conduct by referring to what is or is not reasonable. The Fourth Amendment itself, upon whose text *Garner* rests, bars searches and seizures which are "unreasonable". Is a Court which decides whether a particular search violates the Fourth Amendment deciding a question of common law negligence rather than constitutional law? The question answers itself.

Respondent's pleadings and the Authority's response

Respondent next relies on the hodge-podge of poorly pleaded allegations in his first cause of action (P.Rep. 168a) to argue that negligence was central to this case and that the Authority recognized this by asserting the common law defense of comparative negligence. Respondent's argument is worse than meritless, it is downright meretricious. One must recall that at the beginning of this litigation respondent strenuously insisted that he had nothing to do with robbing Mr. Sandusky, but was an innocent bystander struck by a stray bullet (*see e.g.* P.Rep. 148a-149a). Even after he had been *imprisoned* on his own plea, respondent, at a deposition in a New York State *prison*, lamented that he had been the victim of a mistaken identity, that he had nothing to do with robbing or strangling anyone (P.Rep. 170a-171a). The negligence allegations in respondent's complaint *and petitioner's response to them* were founded on these assertions of innocence.

At trial, of course, respondent dropped his earlier pose. He admitted that he had been robbing and beating Mr. Sandusky, but

(Footnote continued.)

Rodriguez. PP. 1665-1666 continues on to pp. 1667-1669 where the parties and court all agree that *Garner* controls. PP. 1674-1687 contains a meandering colloquy about the charge; references to negligence are conspicuously absent; pp. 1695-1696 are also reproduced as Appendix N, they were discussed above at p. 3; pp. 1882-1897 is the jury charge reproduced at Pet. 82a.

insisted that he was entitled to recover under *Garner* (*see* Third Cause of Action, P.Rep. 167a-168a). Alternatively, respondent argued that New York's Penal Law §35.30 was unconstitutional, and thus the petitioner could not rely on the Penal Law privilege to defeat respondent's suit (Pet. 73a, 76a). It was these theories, and these only which were submitted to the jury, and it was these theories which petitioner defended against at trial (P.Rep. 152a).

Dissent

Nor did the dissenters agree that the suit was submitted on common law negligence grounds. Judge Bellacosa expressly recognized that the majority, by deciding the suit as if it had been a routine negligence case, had "procedurally sidetracked" *Garner* (Pet. 14a). This is an odd choice of words if the majority was affirming a judgment on the very basis that the jury decided the case. In short, Judge Bellacosa recognized that the majority had been less than candid when it held that it was deciding a routine negligence case.

Facts

Despite respondent's crude caricature, the evidence bears out the *McCummings* dissenters that as a matter of law Rodriguez was justified in using deadly force under *Garner.* Rodriguez insisted that he saw McCummings and Wise strangling the elderly Sandusky (P.Rep. 204a-205a). If he did not actually see them do so—and there is no reason, contrary to the majority, to doubt that he did[3]—he certainly heard screams and saw a badly beaten, bleeding, semi-conscious old man (see Appendices P, Q, P.Rep 150a-151a). If, as the majority suggested, the jury was justified in concluding that Rodriguez lacked probable cause to believe that McCummings had committed a *violent* felony, on is forced to the absurd conclusion that Rodriguez lacked probable cause to suspect that McCummings was guilty of *anything.*

[3]The Court is strongly urged to read Rodriguez' chilling account of how he saw McCummings and Wise strangling Sandusky (P.Rep. 204a-205a). While it may be true that this Court will usually defer to a state court's declaration about the facts developed at trial, the Court should be wary of doing so here. The two impassioned dissents as well as the majority's unprincipled conclusion that this case was decided on negligence grounds should lead this Court to view the majority's statements with suspicion.

That a violent felony had been committed was appallingly plain (Pet. 6-9). Equally plain is that Rodriguez had more than probable cause to believe that unless he fired, Wise and McCummings would have escaped. As respondent himself conceded at trial (P.Rep. 169a), the two had opened a 17 to 20 foot lead over the officer who was roughly 20 years older than they were. Under the circumstances, a reasonable officer had only one option: let the two who had been strangling the old man get away or use deadly force. Indeed, that Rodriguez' decision was objectively reasonable is shown by the circumstance that Wise, though shot in the arm, managed to escape. He was only arrested when he turned up at a hospital emergency room seeking aid for his wounds.

Warning

Respondent argues that the Court of Appeals could have affirmed the judgment because Rodriguez, contrary to *Garner*, gave no warning before he shot the fleeing McCummings. The argument runs into several difficulties, the first being the facts. Everyone at trial, Rodriguez, Sandusky, and Officer Mead, testified to a warning (P.Rep. 204a). McCummings was never asked whether he had heard a warning, and even had he denied hearing one, that denial would not be enough to create a question of fact (*see Ford v. Childers*, 855 F.2d 1271, 1276 [7th Cir. 1981]).

Second, the Court of Appeals opinion mentions nothing about "warning" and the Court may not have considered the issue. If so, a remand may be in order. On the other hand, perhaps the Court of Appeals adopted the view of some Circuits (*see e.g. Acoff v. Abston*, 762 F.2d 1543, 1547 [11th Cir. 1985]) and believed that a simple warning of "halt police," much like the warning Rodriguez gave here, was not enough, and that Rodriguez should have warned McCummings that he was going to shoot. This understanding of *Garner's* warning requirement clashes with the understanding of other Circuits (*see Ford v. Childers*, 855 F.2d 1271, 1276 [7th Cir. 1988]) and should be resolved by this Court.

Negligent battery—defending the indefensible

The quality of respondent's argument can best be grasped by examining respondent's exquisitely convoluted footnote 9. Respondent twists himself into contortions as he attempts to explain how a police officer who purposefully shoots a fleeing felon is really guilty of negligence.

And while respondent chides petitioner for criticizing the Court of Appeals, the fact remains that petitioner's criticism is not misplaced. Not a single source which the Court of Appeals cited proves that New York recognizes the monstrous hybrid of "negligent battery". *Flamer, supra* does not prove it. (P.Rep. 153a, Defendant's Brief in *Flamer,* defendant fails to contest the existence of negligent battery.) (P.Rep. 161a, New York Pattern Jury Instructions §3:3, *comment*); *Herndon, supra* does not prove it; *Prosser and Keeton* do not prove it, and the section of Prosser to which the Court of Appeals cited has nothing to say about negligent battery.[4] Indeed, to cite *Prosser and Keeton* as endorsing the existence of negligent battery is to libel both, since *Prosser and Keeton* expressly conclude that to speak of negligent battery is to speak nonsense. *See Prosser and Keeton on Torts,* 5th Ed., §9, p.41, §10, p. 46.

If petitioner has treated the Court of Appeals harshly, that harshness was deserved. Presented with an opportunity to pass on an important Constitutional issue, the Court engaged in a dishonest evasion, deciding a case which was never tried. To the extent that it addressed the important *Garner* issue, it reached the absurd conclusion that *Garner* only spoke to a felon's rights and did not outline the circumstances when the use of deadly force was Constitutionally permissible.[5]

---

[4]The obscure New York negligence manual, *Warren's,* which the Court of Appeals cited also has nothing to say about "negligent-battery," but notes that a police officer who negligently drives a police car is liable in damages. *See 2C Warren's, Negligence,* §84.01[1][b] (corrected citation appearing in official New York Reports).

[5]The Court's decision means that in any §1983 action brought in a New York State court, New York courts will be compelled to hold that *Garner* has nothing to say about when a police officer *may* fire a gun without running afoul of the Fourth Amendment.

Forced to defend the indefensible, respondent mimics the tactics of the Court of Appeals. He distorts the trial record and pretends that the *McCummings* case presented legal issues no different from those presented by a routine intersection collision suit. The record in this case is clear; the law in this case clear; and this Court's own principles of review are crystal clear. This court will not shirk the chance to review an important Constitutional issue, no matter how feverish a state court's attempt to prevent it from doing so. It is respectfully submitted that this suit presents important Constitutional questions which this Court should address.

POINT II

The Court has jurisdiction to entertain the petitioner's due process claims which are meritorious and should be heard.

Respondent is wrong when he argues that this Court lacks jurisdiction to hear Point II. This is not a typical case where a petitioner who has tried and appealed an issue in state court, suddenly awakens to the federal claim he might have raised and then petitions this Court for certiorari. Rather, this is a case in which a state's highest appellate court has *itself* deprived petitioner of due process. It did so by deciding a case contrary to its own principles of procedural and substantive law (*see* P.Rep. 163a), thereby catching petitioner completely by surprise. As this Court noted in *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 85-87, fn.9 (1980) ". . . this Court has held federal claims to have been adequately presented *even though not raised in lower state courts* when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation . . ." (emphasis supplied). Thus, even had petitioner *never* argued below that it was deprived of due process, it could still present its claims to this Court.

In fact, petitioner raised a due process claim when it moved in the Court of Appeals for a rehearing (see App. L). At great length, petitioner argued that both parties had insisted that *Garner* governed this action. (*See* P.Rep. 112a to 125a; *see also*

P.Rep. 94a, Table I.) Petitioner demonstrated how it would have tried the case differently had it known that it could be liable on "common law negligence" grounds. (*See e.g.* P.Rep. 110a, 111a, 126a; *see also generally,* P.Rep. 112a-125a.) Petitioner also pointed out that under its own principles of appellate review, the Court of Appeals could not decide a case on a theory which was never submitted to the jury (P.Rep. 115a-117a); and petitioner showed that New York law does not recognize the tort of "negligent battery" (*see* P.Rep. 125a-128a).

Finally, petitioner complained that the manner in which the Court of Appeals decided this suit violated principles of elemental fairness, i.e., principles of due process. Thus, the Authority asserted that "simple justice" (P.Rep. 117a) required the Court of Appeals to decide the case as it was actually tried (*see also* P.Rep. 123a). Petitioner noted that it had been "unfairly" treated by the Court of Appeals (P.Rep. 124a) and that it had been "denied the Appellate review . . . which [was due it]" by the Court in a manner which was ". . . inherently unjust" (P.Rep. 125a).

The fair intendment of this language was to put the Court of Appeals on notice that it had deprived petitioner of "due process". As this Court has frequently noted, a party need not recite "book and verse" to the precise constitutional provision at issue in order to invoke this Court's jurisdiction. *See Eddings v. Oklahoma,* 455 U.S. 104, 113 (1982). So long as the "clear intendment" of the parties was to raise a constitutional claim, the court has jurisdiction to hear it. *See People v. Zimmerman,* 278 U.S. 63 (1924). (*See e.g. Taylor v. Kentucky,* 436 U.S. 478, 481, fn.10 [1978]; [reference to "fundamental principles of judicial fair play" held to raise federal due process claims]; *Braniff Airways v. Nebraska Board,* 347 U.S. 590, 598, ["clear intendment" to raise due process claims enough to lodge jurisdiction in this Court, even though petitioner never explicitly mentioned due process in state proceedings]. (*See also Wood v. Georgia,* 450 U.S. 261, 264 [where record reveals facts giving rise to due process violations Court may hear it even if petitioner never explicitly referred to due process below]. *See also Vachon v. New Hampshire,* 414 U.S. 478 (1974); *see Bridge Proprietors v. Hoboken Co.,* 68 U.S. 116, 143 (1863).

If one of the factors this Court looks to in determining jurisdiction is whether the state court has been given a fair opportunity to correct its error on a point of federal law this Court should readily conclude that it has jurisdiction to hear Point II. Unquestionably, the New York Court of Appeals knew that petitioner contended it had been denied due process. Petitioner's rehearing papers were detailed, strongly reasoned and persuasive. Unless one supposes that the Court of Appeals is incapable of reading only one conclusion is possible: the Court of Appeals knew that it was depriving petitioner of due process, and because it knew what it was doing, it did not care to respond to petitioner's request for a rehearing.

In short, the court has the power to hear Point II of the Authority's petition.

Conclusion

For these reasons a writ of certiorari should be issued to review the opinion and judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX L—Notice of Motion for Reargument to the New York State Court of Appeals, Affirmation of Lawrence Heisler in Support of Motion and Memorandum of Law.

NOTICE OF MOTION

COURT OF APPEALS

STATE OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Lawrence Heisler, the exhibits annexed hereto, the memorandum decision of this Court dated April 5, 1993, and upon all the pleadings and proceedings heretofore had herein, defendant NEW YORK CITY TRANSIT AUTHORITY will move this Court at the courthouse at 20 Eagle

Street, Albany, New York on the 17th day of May, 1993 at 10:00 in the forenoon for an order granting reargument of the Court's decision and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: Brooklyn, New York
April 30, 1993

Yours, etc.,

ALBERT C. COSENZA
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AFFIRMATION

COURT OF APPEALS

STATE OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

LAWRENCE HEISLER, an attorney duly admitted to the practice of law in the courts of this State, hereby affirms the following under penalty of perjury:

1. I am associated with ALBERT C. COSENZA, attorney for the defendant-appellant NEW YORK CITY TRANSIT AUTHORITY. I submit this affirmation in support of appellant's motion for an order granting reargument of the Court's memoranda decision of April 5, 1993 (Exhibit "A"), in which this court, with two judges dissenting, affirmed a $4.3 million judgment awarded plaintiff Bernard McCummings who was shot while fleeing from a New York City Transit Authority police officer.

2. The McCummings case which the majority decided was never tried. The jury charge which the majority analyzed was never given. Because the majority distorted the record, misstated the facts, and misinterpreted the law, and because the majority, perhaps unknowingly, destroyed New York's law of justification, we respectfully ask the Court to reconsider its decision.

3. The majority begins its memorandum by stating that this lawsuit was "submitted to the jury" on a theory of "common law negligence" (Slip Opinion p. 2). The Court's statement is astonishing. This suit had as much to do with principles of common law negligence as it had with principles of anti-trust law.

4. The sole question presented to the jury was whether Officer Rodriguez was justified in using deadly force pursuant to the standards set by *Tennessee v. Garner* and Penal Law §35.30. This is established by

(a) plaintiff's request to charge (2085-87);

(b) his trial memo (2073-84);

(c) the Authority's request to charge (RA A1-A3);

(d) the colloquy throughout the trial and during the charge conference (*see e.g.* 1665-68), and most crucially;

(e) the charge the trial court gave to the jury (*see esp.* 1890-97);

(f) the questions the jury asked during its deliberations (1918-19);

(g) the court's recharge (1922)[1], and

(h) the First Department's finding that the parties consented to the case being determined pursuant to *Tennessee v. Garner* and the Penal Law §35.30.

5. It may be worthwhile at this point to consult the following two tables. Table 1 compares the charge the trial court gave the jury to the charge plaintiff requested and the language of *Garner*. Table 2 compares the charge with the text of Penal Law §35.30 and plaintiff's request to charge. One fact becomes immediately apparent. There is not a hint of "negligence", common law or otherwise in the case below, nothing beyond the parties' contentions about *Garner* and the Penal Law.

---

[1]The trial judge stated explicitly "I believe that my instructions on the law covered both the Penal Law §35.30 and the Supreme Court decision" (1910; see also 1893 [directing jury to "consider the Penal Law of the State of New York" and the United States Supreme Court decision which applies to that finding"]; 1918).

TABLE 1

CORRESPONDENCES BETWEEN JURY CHARGE, *TENNESSEE v. GARNER* AND PLAINTIFF'S CHARGE REQUEST

CHARGE	*TENNESSEE v. GARNER*	*PLAINTIFF'S REQUEST*
"Generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent a felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others." (1890)	"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officers and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." (471 US 1, 11) Deadly force "may not be used unless it is necessary to prevent the escape, and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others". 471 US at 3	"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officers and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." (2085-86)

"However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law, Section 35.30 a police officer may use deadly force to prevent the scape [*sic*] of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense felony or otherwise but the suspect is armed with a firearm or a deadly weapon or it is necessary for the police officer to defend itself or herself or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under those circumstances would be justified under the law.

Eighteen states allow (including New York under Penal Law §35.30) "the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested."

471 US at 17

Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (2086)

Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (2086)

CHARGE	*TENNESSEE v. GARNER*	*PLAINTIFF'S REQUEST*
"Therefore if you believe the defendants evidence and the testimony of Police Officer Rodriguez that he reasonably believed that the plaintiff committed or attempted to commit a felony of forcible robbery and that the plaintiff and another felony offender, Wise, lunged at him on the landing between PL5 and PL6 and the police officer Rodriguez reasonably believed that the plaintiff posed a threat of eminent use of deadly physical force, of serious physical harm to him or others and that the plaintiff after being shot on the landing ran down the PL6 stairway then the officer's use of deadly force was reasonable and necessary to prevent plaintiff's escape from custody and for the police officer to defend himself from such deadly physical force and such deadly force used by a police officer would be justified and you would bring in a verdict for the defendant.		"6. If you find that Police Officer Rodriguez shot Bernard McCummings as he and Wise lunged at Officer Rodriguez thereby putting him in imminent fear of death or serious physical injury then you must find in favor of the defendant, the New York City Transit Authority. If on the other hand, if you find that Police Officer Rodriguez fired his weapon at Bernard McCummings while he was fleeing after having comitted a robbery and that one of the bullets struck him in the spine at the bottom of the steps (PL 6) and that he was unarmed and posed no significant threat of death or serious physical injury to either police officers Rodriguez or Meade or to a third person, then you must find in favor of the plaintiff."

However, if you disbelieve the defendant's evidence and disbelieve the testimony of Police Officer Rodriguez that—in that the testimony of Rodriguez that he reasonably believed the plaintiff had committed or attempted to commit a felony or forcible robbery and you find as plaintiff claims that neither the plaintiffs nor the other offender Wise actually lunged at the police officer on the landing and that neither of the perpetrators posed any eminent threat of deadly physical force or serious physical harm to the officer then you will next consider if Police Officer Rodriguez's use of deadly force was unjustified or justified.

CHARGE	*TENNESSEE v. GARNER*	*PLAINTIFF'S REQUEST*
"Under that law a police officer may use deadly physical force to arrest or prevent the escape of a person from custody only when the officer reasonably believes that the person comitted the felony or attempted to commit the felony involving the use or infliction or threatened eminent use or infliction of serious physical harm against another person. Provided the level of such deadly force used by the officer is reasonably believed by him to be necessary and not excessive to prevent an escape from custody and if where feasible some warning has given.	"Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. 471 US at 11-12	"Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (2086)

In the event you believe the plaintiff's claim of how and where the deadly force was used from all of the evidence whether or not Police Officer Rodriguez reasonably believed that the plaintiff had committed or attempted to commit a forcible and violent felony and if so whether or not his—it is for you to determine that and if so, whether or not his use of deadly physical force was reasonably believed by him as a police officer to be necessary to prevent plaintiff's escape from custody and it is for you to decide if he gave such sufficient warning where feasible under all of the circumstances that confronted Police Officer Rodriguez immediately prior to and the time of his use of deadly force.

TABLE 2

CORRESPONDENCES BETWEEN JURY CHARGE AND PENAL LAW §35.30

CHARGE	*PENAL LAW §35.30*
"However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law, Section 35.30 a police officer may use deadly force to prevent the scpae [*sic*] of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense felony or otherwise but the suspect is armed with a firearm or a deadly weapon or it is necessary for the police officer to defend itself or herself or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under those circumstances would be justified under the law. (1890-91)	Penal Law §35.30, subd.d 1 provides: 1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

However, if you disbelieve the defendant's evidence and disbelieve the testimony of Police Officer Rodriguez that—in that the testimony of Rodriguez that he reasonably believed the plaintiff had committed or attempted to commit a felony or forcible robbery and you find as plaintiff claims that neither the plaintiffs nor the other offender Wise actually lunged at the police officer on the landing and that neither of the perpetrators posed any eminent threat of deadly physical force or serious physical harm to the officer then you will next consider if Police Officer Rodriguez's use of deadly force was unjustified or justified. (1892)

Therefore, if you find that the plaintiff has sustained his burden of proof that Police Officer Rodriguez did not observe the crime of a forcible robbery in progress or did not reasonably believe that a violent felony had been committed or was attempted to be committed prior to the shooting then under the law the police officer may not use deadly force and if he does use deadly force sufficient—such force would be unjustifiable.

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

However, if you find that the police Officer Rodriguez observed the violent robbery and felony in progress or reasonably believed that a violent felony had been committed or was attempted to be committed prior to shooting then you will next consider if the police officer reasonably believed that the use of deadly physical force was necessary of shooting the plaintiff in the back at the bottom of PL6 to prevent the plaintiff's escape and if a feasible warning was given if you find that Police Officer Rodriguez reasonably believed that the level or extent of his using deadly force of shooting plaintiff in the back at the bottom of PL6 stairway was reasonably necessary to prevent plaintiff's escape and not excessive and a feasible warning was given under all of the circumstances confronting the officer at the time then you would find that the police officer was justified in using deadly force.

On the other hand, if you find that the plaintiff had sustained his burden of proof that Police Officer Rodriguez was not reasonable in believing that the level or the extent of using deadly force was necessary to prevent plaintiff's escape from custody under the circumstances confronting the officer at the time in shooting him in the back at the bottom of PL6 and he failed to give a feasible warning then you would find that his use of deadly force was not justifiable or unjustifiable.

(1895-96)

6. Simply put, the outcome of this lawsuit did not hinge on an interpretation of common law principles. Instead, it hinged on an interpretation of statutory and constitutional principles: specifically, did the Fourth Amendment, as interpreted by the Supreme Court in *Garner,* and New York's Penal Law §35.30 allow Officer Rodriguez to use his weapon under the circumstances presented at trial?

7. The parties, in short, charted their own course by agreeing to have this lawsuit turn solely on whose interpretation of *Garner* and the Penal Law was correct, plaintiff's or the Authority's. Thus, the majority's two critical conclusions, (a) that this suit was decided on principles of "common law negligence" and (b) that a police officer who complied with the Penal Law and *Garner* could still face civil liability runs afoul of one crucial fact: *the parties explicitly agreed that if Officer Rodriguez complied with the Penal Law and Garner, the Authority would escape civil liability.*

8. There are other problems with the Court's decision to affirm the judgment on the basis of "common law negligence". Both parties agreed that Police Officer Rodriguez deliberately and intentionally shot Bernard McCummings; the shooting was not an accident. The sole point in dispute was whether that shooting was justified. In the factual context of this lawsuit, the notion of a negligent assault or battery is an oxymoron, a conceptual contradiction in terms. (*See e.g. Panzella v. Burns,* 169 A.D.2d 824 [2nd Dept. 1991]). By introducing principles of negligence to the wholly inappropriate area of intentional police conduct, the court has thrown into confusion an array of what has heretofore been thought to be settled principles of law. To take one obvious example, will a party who claims to have been

intentionally shot by a defendant now have the benefit of a three-year negligence statute of limitations, should he decide to frame his suit on "common law negligence" grounds?

9. The majority opinion also contains serious misstatements of law. In affirming the Appellate Division's judgment, the majority declared that neither the Penal Law nor *Garner* establishes standards for permissible action in civil suits. Penal Law §35.30 in the Court's view, merely protected a police officer from criminal prosecution. The same officer, however, stood exposed to civil liability if he or she took action which a jury found unreasonable, even though those actions complied with the provisions of the Penal Law.

10. This court doubtless thought that it was treating only the narrow question of when a police officer could be civilly liable for firing a weapon at a fleeing felon. But what this court's decision has done is effectively destroy the entire foundation of New York's law of justification. For decades courts and attorneys have looked to the Penal Law to discover under what circumstances a person's intentional conduct would be justified and free from all liabilities, civil or criminal. No more.

11. Penal Law §35.30 governs the circumstances under which police officers and others can use deadly force. But §35.30 is only one provision among many in Article 35 of the Penal Law. Other provisions address a wide variety of purposeful conduct and the circumstances under which such conduct is justified.

12. For example, may a parent use corporal punishment to discipline his or her child? Penal Law §35.10(i) states that he or she can. Under this court's reasoning, however, all that §35.10 does is protect a parent from criminal prosecution. Could children reaching adulthood, sue their parents by arguing that corporal punishment, no matter how moderate, is never justified? Under this Court's decision they could.

13. May a bus operator prevent passengers who have been vandalizing his bus from leaving the bus in order to transport the vandals to a police station? In *Sindle v. New York City Transit Authority,* 33 N.Y.2d 293, 352 N.Y.S.2d 183 (1973) this Court, confronted with those facts, looked to the provisions of Penal Law §35.10 for an answer. The Court held that under §35.10 the bus operator's actions were privileged; the bus operator would be immune from all liability, criminal *or civil* for taking reasonable steps to maintain order on his bus. Under this Court's decision in *McCummings,* however, *Sindle* is no longer good law.

14. May a physician administer a "recognized form of treatment which he [or she] reasonably perceives necessary in the event of a medical emergency, without facing civil liability"? Again, Penal Law 35.10(5) appears to shield the doctor from any liability, but this Court's decision in the *McCummings* case leaves the matter in great doubt. All that the physician would be assured of is that he would not be criminally prosecuted. *McCummings,* however, would allow a patient to sue the doctor for battery regardless of the provisions of the Penal Law.

15. Perhaps the gravest damage that flows from this Court's decision is that it now places in doubt the circumstances under which a police officer may take *any* police action whether (a) placing someone under arrest, (b) using physical force to overcome a criminal suspect's physical resistance or (c) firing a weapon in order to capture a fleeing felon.

16. Suppose a police officer has probable cause to believe that a person has committed a crime in his presence. May the police officer place that person under arrest without fear of civil liability? Criminal Procedure Law §140.10(1) (b) states that a police officer may make a warrantless arrest when the officer has reasonable cause to believe that the person committed a crime in his presence. It had been commonly assumed that a police officer who arrests someone based on probable cause would remain immune from civil suit. No more. After all, the Criminal Procedure Law, it can be argued, merely establishes the circumstances under which a criminal arrest is valid. It has nothing to say on the civil consequences of such an arrest.

17. Any imaginative attorney can fashion an argument, perhaps employing a balancing test, to persuade a jury that under the facts of a particular case, a police officer should not have physically taken someone into custody. Depending on the severity of the crime, the age of the offender, what the police officer knew about his personal history, a plaintiff's attorney will be now be able to argue in a civil suit that, regardless of the provisions of the Criminal Procedure Law, the police officer should have given the alleged offender a desk appearance ticket.

18. In short, it is no exaggeration to state that, after *McCummings*, police officers would be extremely rash to exercise *any* form of police power. These officers will know that all that stood between themselves and a massive tort judgment was their ability to persuade a jury that they acted "reasonably".

19. Moreover, what are ranking police officials to tell their officers about when they may use force to arrest or capture a suspected lawbreaker? How is a police officer to know when he or she may or may not fire a weapon to capture a fleeing felon? How are police officers to know when they are required to retreat before shooting and when they are permitted to stand their ground (*see* Penal Law §35.15[2] [a][ii]). Certainly, after the *McCummings* decision, police instructors can tell their subordinates very little.

20. By straining to affirm plaintiff's favorable judgment, this Court has undermined the settled expectations of police officials, municipalities and government bodies, the drafters of the Pattern Jury Instructions (see 2 PJI 3:4 pp. 593-98), lawyers and litigants. We respectfully submit that the Court should reconsider its decision to destroy New York's justification scheme.

21. There are other grounds for reversal. The majority affirmed the lower court judgment because it believed that *Garner* did not protect a police officer from a civil suit founded on "common law negligence". Moreover, continued the court, even if *Garner* did apply, the jury could have resolved certain questions of fact against the Authority, justifying the verdict in plaintiff's favor.

22. Aside from the problems with this reasoning pointed out earlier, there is an additional reason why this Court should reconsider its conclusion. On April 9, 1993, four days after the court issued its decision in *McCummings*, the Eighth Circuit in *Krueger v. Fuhr*, ____ F.2d ____, retrievable on Westlaw (tm) at 1953 WL 103033 (8th Cir. 1993), applying *Garner*, granted summary judgment in favor of a police officer who had shot a fleeing criminal suspect in the back. The Eighth Circuit rejected the argument that simply because plaintiff had been shot in the back there were unresolved issues of fact for a jury to decide. As *Krueger* establishes, *Garner* sets out a standard for permissible conduct which shields a police officer from civil liability. Moreover, as *Krueger* and the other cases cited in the Authority's original brief demonstrate, very often a police shooting incident can be disposed of as a matter of law. The Court was wrong to wring the record dry in order to extract a bogus "question of fact" justifying the verdict below.

23. Finally, a word about the other errors the Authority raised in its briefs. The Court's mistaken reference to the theory on which this case was decided—common law negligence—suggests that all the other issue in this case deserves a second look. We respectfully ask the Court to look at the other issues raised below, particularly Point III, and for the reasons outlined therein, order a new trial.

WHEREFORE, defendant-appellant requests that its motion be granted.

Dated: Brooklyn, New York
April 30, 1993

LAWRENCE HEISLER

MEMORANDUM OF LAW

COURT OF APPEALS

STATE OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

The NEW YORK CITY TRANSIT AUTHORITY submits this memorandum of law in support of the Authority's motion for reargument of the court's memorandum decision of April 5, 1993.

PRELIMINARY STATEMENT

In its April 5th memorandum, the majority concluded that this case was submitted to the jury on a theory of "common law negligence". The court also concluded that the provisions of Article 35 of the Penal Law merely addressed the question of criminal culpability. A police officer privileged to act under Article 35 remained immune from criminal

prosecution; but the same police officer might have to answer in damages if his actions were challenged in a tort suit.

The court also believed that the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985) did not shield the Authority from tort liability under "common law negligence" principles. Finally, the court concluded that even under *Garner* and the Penal Law there were still factual issues which if the jury resolved against the Authority, justified the verdict in plaintiff's favor.

As we briefly outline in this Memorandum, the court's decision is wrong on every count. To begin with, the court's conclusion that this lawsuit was submitted on a theory of common law negligence borders on the bizarre. As the annexed table demonstrates, both parties agreed that the outcome of this lawsuit hinged on the meaning of the Penal Law and *Tennessee v. Garner*. That was the only theory submitted to the jury; that was the only theory outlined in the parties' requests to charge; and that was the only theory on which the case was decided.

Had common law negligence played any role in the suit below the case would have been tried in an entirely different manner. The Authority would have asked the court to submit to the jury the issue of plaintiff's "comparative negligence". The Authority would have argued that under this court's decision in *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984), plaintiff was barred from recovery as a matter of law; and the Authority would have moved to set aside the verdict since plaintiff did not produce expert testimony about what generally-accepted police practice allowed a police officer to do when pursuing a violent fleeing felon.

The notion that common law negligence played any role in this suit is flawed in another respect. To speak of common law negligence in the factual context of this lawsuit is to

speak conceptual nonsense. Bernard McCummings was not hit by a stray bullet, accidentally discharged from Transit Officer Rodriguez' gun. All parties agreed that Rodriguez intentionally and volitionally shot McCummings, differing solely on the question of whether Rodriguez was justified in so doing. Under these facts it would have been error to submit common law negligence to the jury, even had any of the parties suggested it.[1]

The court's conclusion that the Penal Law justification privileges are irrelevant in the context of a civil suit overturns decades of case law and undermines large portions of the PJI. All Appellate Courts, including this one, have repeatedly held that the justification privileges contained in Article 35 do more than address an actor's criminal culpability. By concluding that the Penal Law privileges are irrelevant in a civil context, this court has assured that a prudent police officer will hesitate long and hard before taking any police action, whether it be making an arrest, using physical force, or firing a weapon. That police officer will know that if a jury, years down the road, concludes that he or she acted "unreasonably", he or she stands exposed to substantial tort damages. As outlined in greater detail below, the court's decision will produce chaos in what had heretofore been a well settled area of the law.

The Court also concluded that even if the Penal Law and *Garner* applied, there were still question of facts that could have been resolved against the Authority. Four days after the court reached its *McCummings* decision, the Eighth Circuit in *Krueger v. Fuhr*, ____ F.2d ____, retrievable on Westlaw (tm) at 1993 WL 103033 (8th Cir. 1993), delivered a decision that shows how wrong this court was. In *Krueger* the court granted summary judgment to a municipality

[1]Applying negligence standards to this suit is like saying that Rodriguez shot McCummings "accidentally on purpose".

whose police officer had shot a fleeing felon in the back. The *Krueger* decision demonstrates why police criminal encounters can often be disposed of as a matter of law. We respectfully submit that, if viewed fairly, the evidence here can only lead to one conclusion: that Police Officer Rodriguez was justified in using his gun rather than let McCummings and his cohorts escape.

Finally, the Authority directs the court's attention to the other points raised in its brief. As we believe we have demonstrated, the court's conclusion that this lawsuit was tried on common law negligence grounds demonstrates that perhaps this court did not fully grasp some of the issues in this suit. The points we raised were not trivial; they perverted the trial process. For all these reasons we respectfully request that the court reconsider its earlier decision.

ARGUMENT

POINT I

THE ONLY THEORIES OF LIABILITY AT TRIAL WERE PENAL LAW §35.30 AND *TENNESSEE v. GARNER*; COMMON NEGLIGENCE WAS NOT CHARGED TO THE JURY. MOREOVER, NEW YORK LAW DOES NOT RECOGNIZE THE EXISTENCE OF "NEGLIGENT BATTERY".

This Court has inexplicably reviewed a trial which never occurred. At the genuine trial, the jury was *never* charged on negligence principles. *Instead, it was repeatedly told, at the instance of both parties, that Tennessee v. Garner, 471 U.S. 1 (1985) and New York Penal Law §35.30 were to govern its decision.* Under the circumstances, it is this Court's respon-

sibility to grant reargument and to issue an opinion based upon the trial as it actually happened.

Both plaintiff (1680, 2085-86; see also 2079-82) and defendant (1689, 1690, 1909-10) sought at trial to have *Tennessee v. Garner*, 471 U.S. 1 (1985) charged as the governing law of the case. The trial court, agreeing to so charge, (1667-70, 1679-80, 1687), told the jury it must apply the law as set by "the United States Supreme Court" (1890, see 1890-93) and included in the charge direct quotes from the Supreme Court's decision (see 1890-93, and Tables, hereinbelow).

Both sides and the trial judge, further, agreed that §35.30 of the Penal Law was applicable in this civil action (706, 1667-70, 1679-80, 1687, 1689, 1696, 1890-93, 1909-10, 1917-21, 1922-23).[2] Defendant sought to have the statute charged to the jury (1689, 1696, 1909-10, 1917-18); plaintiff argued that the statute would have applied but for the alleged circumstance that it was unconstitutional because "the Supreme Court of the United States in that case *[Tennessee v. Garner]* ruled that any statute that permits anyone to shoot a fleeing felon that is unarmed is unconstitutional and not enforced in this country" (706; see also 2086). In line with this, plaintiff's counsel sought a jury charge that Penal Law §35.30 was unconstitutional to the extent that it authorized the use of deadly force against a "suspect who poses no immediate threat to the officer and no threat to others" (1667; see also 2086). *While that was refused, portions of Penal Law §35.30 were included in the jury charge (1893-94).*[3]

[2]The trial judge commented "I believe that my instructions on the law covered both the Penal Law §35.30 and the Supreme Court decisions" (1910, see also 1893, 1918).

[3]See, further, 695-715 for the consensus at trial that *Garner* as well as Penal Law §35.30, barring an alleged Constitutional infirmity, applied.

Thus, plaintiff, defendant and the trial court were in complete agreement that *Tennessee v. Garner* had to guide the jury's determination. Both parties also agreed that §35.30 of the Penal Law was applicable, though plaintiff made the caveat that, to the extent it was in conflict with the *Garner* decision, it was unconstitutional and should not be applied.

THE ONLY STANDARDS REQUESTED TO BE CHARGED TO THE JURY, AND THE ONLY STANDARDS IN FACT CHARGED, WERE THOSE SET FORTH IN *TENNESSEE v. GARNER* AND PENAL LAW §35.30. No negligence charge was sought; no negligence charge was given.

The trial court could not have made it clearer to the jury that they were to apply *Tennessee v. Garner* and Penal Law §35.30: "In other words what I am saying is if you believe the plaintiff's claim you will then consider the penal law of the State of New York and the United States Supreme Court decision which applies to that finding" (1893). The jury was confused but nevertheless understood that they were supposed to apply *Garner* or §35.30. They sent a note while deliberating, seeking guidance on "law on use of deadly force, Penal Code 35.30 of the Supreme Court" (1919).

If this Court is correct in stating that this is a negligence case (see Slip Opinion at pp. 2, 5), then a new trial is in order so that the case can be decided by a jury instructed in such elements of negligence as proximate cause, foreseeability and defendant's culpable conduct. That, however, is not the proper course herein.

The parties, "charted their course" at the trial below. They were in complete agreement that *Garner* and §35.30 were the only underlying sources for the standards to be charged to the jury. The parties having charted this course, the Court of Appeals cannot, at this point in time, hold that

neither plaintiff nor defendant sought the correct standard of law. *Neither can this Court properly affirm on the basis of a theory never charged to the jury.* Instead, this Court must review the charge to see whether it accurately did what both sides and the judge agreed it should do: give the jury the standards set by the United States Supreme Court in *Tennessee v. Garner* and by Penal Law §35.30.

In *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1975): plaintiff allegedly had been injured due to a defective condition on a public sidewalk. At trial the City of Cohoes and plaintiff both relied upon an ordinance requiring simply that the City have actual notice of a defective condition. After the verdict the City argued that the ordinance had been amended so that actual notice was not sufficient; written notice was required. This Court affirmed the refusal of the lower courts' to set aside the verdict. "[P]arties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied. The case before us was tried from the very beginning on the theory of actual notice with the acquiescence if not, indeed, at the formal request, of the city." 37 N.Y.2d at 165 (citations omitted).[4]

"The parties to a lawsuit are free to chart their own course at the trial and may fashion the basis upon which a particular controversy will be resolved." *Cullen v. Naples*, 31 N.Y.2d 818, 819, 339 N.Y.S.2d 464 (1972; citations omitted). "It has long been the law that agreement on a theory of damages at trial, even if only implied, must con-

[4]Plaintiff sought in his trial memorandum of law to have the case governed by *Tennessee v. Garner*, which he termed "the controlling case" (2079). Both sides requested *Garner* be charged and the jury was instructed to "consider the Penal Law of the State of New York and the United States Supreme Court decision which applies to that finding" (1893).

trol on appeal." *T.W. Oil, Inc. v. Consolidated Edison Company of New York, Inc.*, 57 N.Y.2d 574, 587, 457 N.Y.S.2d 458 (1982). In light of "the decision by opposing parties to a civil case to chart their own litigation course, . . . unless public policy is affronted, the law ordinarily raises no obstacle." *Id.* at 580.

> We have repeatedly held that, unless public policy is affronted, parties to a civil dispute are free to chart their own litigation course. *(T. W. Oil v. Consolidated Edison Co.*, 57 N.Y.2d 574, 579-80; *Rector, Church Wardens & Vestrymen of St. Bartholomews' Church v. Committee to Preserve St. Bartholomew's Church*, 56 N.Y.2d 71, 76; *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165). They may 'fashion the basis upon which a particular controversy will be resolved' (*Cullen v. Naples*, 31 N.Y.2d 818, 820). And in doing so '[t]hey may stipulate away statutory and even constitutional rights'. (*Matter of New York, Lackawanna and Western R.R. Co.*, 98 N.Y. 447, 453). *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148 (1984).

See also *Havas v. Victory Paper Stock Co., Inc.*, 49 N.Y.2d 381, 426 N.Y.S.2d 233 (1980).

Both sides insisted at trial that *Tennessee v. Garner* was the governing law. Further, it was agreed that, leaving aside plaintiff's allegation of possible Constitutional infirmity, §35.30 of the Penal Law also set applicable standards. Plaintiff's request for a *Tennessee v. Garner* instruction, and the fact that plaintiff objected to §35.30 only insofar as it allegedly was in conflict with *Garner* means that this Court cannot review the verdict below based upon standards which were not before the jury. See *Barry v. Manglass*, 55

N.Y.2d 803, 447 N.Y.S.2d 423 (1981); *Derdarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980). Instead, this Court must review, as it has not yet done, the standards which *were* before the jury and which the parties intended to apply. *Caruso v. Ward*, 72 N.Y.2d 432, 534 N.Y.S.2d 142 (1988).

This Court's majority opinion, in effect, credits the trial jury with telepathic powers. The jury was never charged on negligence principles. It was never told that it must determine simply, as this Court would have it, whether Officer Rodriguez' use of deadly force was reasonable under the circumstances. Instead, it was told, with the acquiescence of both parties, that the law it must apply was that set forth in *Tennessee v. Garner* and §35.30. It is impossible to truly conclude the jury reached its verdict based upon a theory not before it and that it necessarily ignored the only theories of liability purportedly before it: those set forth in *Tennessee v. Garner* and §35.30 of the Penal Law.

This Court has a responsibility it has not yet fulfilled. The trial judge thought his charge accurately gave the jury the controlling law as set forth in *Tennessee v. Garner* and §35.30. This Court, in simple justice, must review the charge in this light, to see whether or not it did what the trial judge and both parties sought for it to do.

The charge requests and the charge

That all parties and the trial court thought that Penal Law §35.30 and *Garner* were the standards the jury had to follow is made very clear by the record.

So far as plaintiff was concerned, the only theory that should have been before the jury was that expressed in the Supreme Court's decision of *Tennessee v. Garner*. Thus, in his trial memorandum submitted to the court below, plain-

tiff's counsel stated: "The controlling case in situations involving the use of deadly force to apprehend unarmed fleeing felons is *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985)" (2079).

Plaintiff reaffirmed his commitment to the theory that only *Garner* should be charged to the jury in "Plaintiff's Request to Charge". After requesting the boilerplate charge of PJI 1:22 he went on to seek the following charge:

> Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution. *Tennessee v. Garner*, 105 S.Ct. 1694 (1985) at p. 1699, 471 U.S. 1; *Davis v. Little*, 854 F.2d 605 (2nd Cir. 1988); *Heath v. Henning*, 854 F.2d 6 (2nd Cir. 1988). (2085)

Both *Davis v. Little* and *Heath v. Henning* interpret and apply *Tennessee v. Garner* in a civil rights context. Plaintiff then went on in his request:

> 3. Reasonableness is to be determined by balancing the infringement to the individual's interest caused by the police action against the governmental interest served by that action. *Martin v. Malhoyt*, 830 F.2d 237, 261 (D.C. Cir. 1987); *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983). (2085)

Continuing his *Garner* analysis of the case, plaintiff's request continued:

> 4. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is

> constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. The New York statute, Penal Law §30.30, is unconstitutional insofar as it may be interpreted to authorize the use of deadly force against such fleeing suspect.
>
> (2085-86)

Almost all of the preceding paragraph, starting with "the use of deadly force" and ending with "killing the suspect" is an exact quote from *Tennessee v. Garner* (see 471 U.S. at 11). The last sentence is virtually a quote, simply substituting Penal Law §35.30 for "The Tennessee statute" and altering the syntax slightly.

Having raised §35.30 of the Penal Law in his request, plaintiff went on to explain the application he would give to it:

> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to

> prevent escape, and if, where feasible, some warning has been given. As applied in some circumstances, the New York statute would pass constitutional muster. *Tennessee v. Garner, supra* (at 1701); *Davis v. Little, supra; Heath v. Henning, supra.* (2086)

Once again, all of the above paragraph is a quote from *Tennessee v. Garner.* See 471 U.S. at 11-12.

Plaintiff's Request "5" was the definition of "serious physical injury" contained in §10 of the Penal Law (2086). Request 6 (2087) directed the jury to find for the Authority if they found that McCummings *and Wise* had lunged at the officer and put him in imminent fear of death or serious physical injury. "On the other hand, if you find that Police Officer Rodriguez fired his weapon at Bernard McCummings while he was fleeing after having committed a robbery and that one of the bullets struck him in the spine at the bottom of the steps (PL-6) that he was unarmed and posed no significant threat of death or serious physical injury to either police officers Rodriguez or Mead or to a third person, then you must find in favor of the plaintiff."

Plaintiff's final request, Request "7", was that the jury might conclude that if Rodriguez was lying about McCummings and Wise lunging at him they might conclude that this was "a cover up story" which indicated a "consciousness of guilt" (2087).

Thus, the theory of liability which plaintiff wished to present to the jury was that contained in *Tennessee v. Garner.* This was also made crystal clear in the charge conference (*see* 1665-1709). Defendant also sought to have the case determined under *Garner* (*Id.*, see also 958-66, 1657, 1661-63, 1909-10, 1958-60), and sought to have language from the decision and the statute read to the jury (1909-10,

1917, 1922-23) as the Court had promised would be done (1659, 1679; *see also* 1659).

The court's charge itself is a rather garbled version of the law as set forth by Penal Law §35.30 and *Tennessee v. Garner* (see esp. 1890-96). It starts off its explanation of the law by stating "generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent the felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others" (1890).

The trial justice then went on to insist that both *Garner* and Penal Law §35.30 applied:

> However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law §35.30 a police officer may use deadly force to prevent the scape [*sic*] of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense, felony or otherwise, but the suspect is armed with a firearm or deadly weapon, or if it is necessary for the police officer to defend itself [*sic*] or herself or another person, from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under these circumstances would be justified under the law. (1890-91)

The charge itself is full of muddled but recognizable versions of the language of Penal Law §35.30, the *Garner*

decision, and plaintiff's request for a charge on *Garner*, as the following tables show:

(Tables are printed herein, *supra*, at pp. 96a to 102a.)

No one at the trial below thought that a charge had been given intending to set a standard other than those set by Penal Law §35.30 and Tennessee v. Garner, though the Authority took the position that the standards set by those two sources had been muddled in the jury instructions.

This Court needs to review those instructions to see whether they did what the trial judge intended and guided the jury's discretion by the sole light of *Tennessee v. Garner* and Penal Law §35.30.

The plaintiff's request has been extensively quoted above. The defendant repeatedly requested that Penal Law §35.30 and a paragraph from *Tennessee v. Garner* be read to the jury as the applicable standards (1909-10, 1917-18, 1922-23; see also 1957-58). The trial judge in the pre-charge conference indicated that he would do this (1659, 1679; see 1667, 1687).

Certainly the jury thought that it was applying Penal Law §35.30 and/or *Tennessee v. Garner*. It requested the court to instruct it on the "law on the use of deadly force by Penal Law §35.30 of the Supreme Court" (1919, and see, similarly, 1921). The court refused the Authority request, made after these jury notes, to read §35.30 and *Garner* to the jury (1917-18, 1922-23). It was the court's position that it had given the essence of §35.30 and *Garner* in the instructions that it had already given and merely reread them (1917-23).

Two points cannot be reiterated too often: (1) no negligence charge was sought or given to the jury below; (2) both sides requested that *Garner* be charged to the jury and agreed that §35.30 of the Penal Law was applicable on its

face, although plaintiff argued that it was unconstitutional to the extent it conflicted with the *Garner* standard.

The verdict sheet sent into the jury asked only one question on liability: "Did Police Officer Manuel Rodriguez use deadly force unjustifiably on June 28, 1984 against the plaintiff Bernard McCummings?" (2088) Justification, and justification as defined in Article 35 of the Penal Law, was the only true question before the jury below. If this case were, in fact, a negligence case, then surely, at the very least, the jury should have been instructed to consider McCummings' culpable conduct in creating the situation in which he got shot in the first place. The point is that this was *not* a negligence case. It was—at least so far as the trial judge, the parties, and the jury were concerned—a case which involved *Tennessee v. Garner* and Penal Law §35.30 *and virtually nothing else.*

There are only two possibilities before this Court: (a) It's decision was correct insofar as it has held that neither §35.30 of the Penal Law nor *Tennessee v. Garner* created a standard which should have been applied by the jury below. If this is the case, a new trial must be had so that the proper standard may be charged to the jury. (b) Since all the parties involved in this case sought and received a charge which set standards explicitly derived from §35.30 of the Penal Law and *Tennessee v. Garner,* this Court, regardless of their applicability or inapplicability outside this case, must review the charge in light of *Garner* and §35.30 to see if it accurately reflected the standards set by them. This, it is submitted, the Court has not yet done but must do if justice is to be served.

The inconsistent and unfair treatment the Authority has received in the First Department and in the Court of Appeals

The Authority has received inconsistent treatment on this issue. The Appellate Division, refusing to consider the Authority's argument that *Garner* should not be applied retroactively, held that *Garner* must be applied as the parties had effectively charted their own course.[5] In fact, the Appellate Division's opinion has since been cited, in conjunction with such decisions as *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1985), to support the proposition that as Appellate Court will not review an alleged charge error to which neither party objected. See: *Schwartz v. Cross Bay Excavators, Inc.*, ____ A.D.2d ____, ____ N.Y.S.2d N.Y.L.J., 4/16/93, p. 33, col.1-2 (2nd Dept. 1993).

In stark contrast, this Court has chosen to ignore the fact, amply illustrated above, that *Tennessee v. Garner* was deemed applicable by plaintiff, defendant and the trial justice at the trial of this action. Instead, it has analyzed this case as though a charge had been sought or given, as it never was, on *negligence*.

Thus, the Authority could not have its arguments *against* the application of *Garner*, as fundamental error, heard in the First Department because it had charted its own course, in conjunction with plaintiff, at trial. In the Court of Appeals,

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[5] "[S]ince defense counsel not only did not object to reliance upon *Tennessee v. Garner, supra*, but acknowledged that *Garner* is both controlling and retroactively applicable, defendant may not for the first time before this Court endeavor to disclaim the relevance and applicability of *Garner*." *McCummings v. NYCTA*, 177 A.D.2d 24, 27, 580 N.Y.S.2d 933 (1st Dept. 1992).

it cannot have its arguments heard as to the proper interpretation of *Garner*, as if no course had been agreed upon at trial. This is inherently unjust. For all intents and purposes, the Authority has been denied the appellate review which it is the duty of this Court to provide. The Court of Appeals should rectify its error and review this case and the law charged to the jury as controlling: *Tennessee v. Garner* and Penal Law §35.30.[6]

Common law negligence

The majority's assertion that the suit was decided on principles of common law negligence runs into other problems as well. The case could not have been decided on negligence principles because negligence principles are utterly out of place in a lawsuit founded on an intentional shooting.

Recall, that at least at trial[7] plaintiff never accused Officer Rodriguez of carelessly discharging his gun. Rather, plaintiff claimed that Rodriguez shot him intentionally in order to prevent him from escaping.

Nor did the Authority try to defend Rodriguez' action by arguing that the officer's gun went off accidentally. The Authority admitted that Rodriguez shot plaintiff inten-

[6]This Court, as well, should review the gross, persistent, and objected-to misconduct of plaintiff's counsel. A case in which counsel referred to a police officer as "Dirty Harry" (1785) and invited the jury to dip into the defendant's "deep pockets" (1789) where it would find "billions" (1789) demands a new trial. See, 160, 202-03, 205, 210, 211, 217-18, 264-65, 267-68, 277-81, 284, 285, 345, 358, 469, 542, 543-44, 1776, 1781-82, 1789, 1799-1800, 1808, 1820, 1831, 1834, 1860, 1958.

[7]Earlier, plaintiff had sworn that he was the victim of an accidental shooting and that he had nothing to do with robbing and mugging Mr. Sandusky (939-40). At trial plaintiff changed his tune.

tionally but argued that he had the right to do so. To speak of negligence, common law or otherwise, in the factual contents of this lawsuit is to speak of nonsense.

As a leading text on the law of torts states: "There is properly speaking, no such thing as negligent assault". *Prosser and Keeton on Torts*, §10, p. 46.

Indeed, once the evidence established that the gist of plaintiff's claim was founded on an intentional tort such as battery, it would have been error for the trial court to allow plaintiff to recover on a theory of negligence. *See e.g. Murray v. Long Island Railroad Co.*, 35 A.D.2d 579, 313 N.Y.S.2d 610 (2nd Dept. 1970), aff'd 28 N.Y.2d 849, 322 N.Y.S.2d 248 (1971). *See also Trott v. Merit Department Stores*, 106 A.D.2d 158, 484 N.Y.S.2d 827 (1st Dept. 1985) assault action governed by one year intentional torts statute of limitations not three year negligence statute. *Cf. also Rafferty v. Ogden Memorial Hospital*, 140 A.D.2d 911, 528 N.Y.S.2d 729 (3rd Dept. 1988); *cf. Panzella v. Burns*, 169 A.D.2d 824, 825, 565 N.Y.S.2d 194 (2nd Dept. 1991), "it is well established that once intentional offensive contact has been established, the actor is liable for assault and not negligence".

Had this lawsuit been tried on negligence principles, an entirely different array of issues would have been presented to the jury. For example, the Authority might have asked the jury to consider McCummings' "comparative negligence" in arriving at its verdict. The Authority might also have asked the trial court to consider whether plaintiff, the victim of a negligent "shooting" should have been barred from seeking to recover from damages arising from his criminal misconduct. See *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984).

In short, both factually and conceptually "negligent battery" did not and could not play any part in this lawsuit.

In straining to uphold plaintiff's judgment, the Court has done more than just reach the wrong result in a single lawsuit. By importing into the territory of intentional tort, principles of negligence law, the court has blurred the distinction which had heretofore existed between intentional and unintentional torts. It has succeeded in throwing into confusion a large area of tort law. For there are many distinctions between a suit founded on negligence as opposed to one founded on a claim of intentional misconduct.

The measure of damages may differ (*cf. Sharapata v. Town of Islip*, 56 N.Y.2d 332 [1982]);

the statute of limitations may differ (*see* CPLR 214, 215);

the nature of the proof a plaintiff must offer to prevail may differ;

or at the least they used to until this Court's decision in *McCummings v. New York City Transit Authority.*

Nor does the case the majority relied on, *Flamer v. City of Yonkers*, 309 N.Y. 114 (1955), establish that New York recognized a cause of action for "negligent battery". In *Flamer* defense counsel *never challenged* plaintiff's claim that he had been negligently assaulted and battered; defendant never questioned the existence of a negligent battery cause of action. Since defendant acquiesced in the theory of negligent battery which plaintiff submitted to the jury, defendant was bound by the course of conduct he charted. *Flamer*, then, does not establish that New York recognizes a negligent battery claim.

Nevertheless, *Flamer* is indeed relevant, although not for the reasons the majority thought. *Flamer* establishes that where the parties to a suit chart their own course by agreeing to have their suits tried under a particular theory, this court will respect their decision no matter how flawed their understanding of the law.

In our case, both parties agreed to have this lawsuit turn on questions of statutory and constitutional interpretation, i.e., the meaning and applicability of *Garner* and the Penal Law. If the court held the parties to a course they charted in *Flamer*, endorsing the existence of a spurious cause of action for negligent battery, it should certainly honor the course the parties chartered here. It should recognize that the parties agreed to have their case decided under *Garner* and the Penal Law.

POINT II

THE PRIVILEGES CONTAINED IN *GARNER* AND THE PENAL LAW APPLY TO CIVIL TORT SUITS AS WELL.

The Court's conclusion that Penal Law Article 35 does not apply in the context of a civil lawsuit is wrong on the law, wrong on history, and wrong on policy. It clashes with this Court's own decisions, the decisions of every Appellate Court in this State, as well as the law summarized in the Pattern Jury Instructions.

Only 20 years ago in *Sindle v. New York City Transit Authority*, 33 N.Y.2d 293, 352 N.Y.S.2d 183 (1973) this Court explicitly held that the privileges contained in Penal Law Article 35 were equally applicable to intentional conduct which gave rise to a civil lawsuit. In *Sindle*, the infant plaintiff had been riding on board a bus along with other students. The students had gotten rowdy and had begun vandalizing the bus. The driver of the Transit Authority bus locked the doors and announced that he would keep them shut and drive the vandals to a local police station. At some point on the way to the station the infant plaintiff jumped off the bus, sustaining serious injuries.

Plaintiff eventually sued the New York City Transit Authority, accusing it of falsely imprisoning the infant plaintiff. During the course of the trial the Transit Authority moved to amend its answer to plead the affirmative defense of justification outlined in Penal Law 35. In a nutshell, 35.10(3) allows a person responsible for the maintenance of order on a bus to use physical when and to the extent he or she reasonably believes necessary to maintain order. The Authority argued that if it were allowed to plead and prove the defense, it could persuade the jury that its bus driver's action in shutting the bus doors was justified; it could defeat plaintiff's cause of action for false arrest.

This court agreed. It held that it was an abuse of discretion for the lower court to deny the Authority's motion. The court specifically held that the defense contained in Penal Law §35.10, if established, would defeat plaintiff's civil tort suit:

> In view of our determination, it would be well to outline some of the considerations relevant to the issue of justification. In this regard, we note that, generally, restraint or detention, reasonable under the circumstances and in time and manner, imposed for the purpose of preventing another from inflicting personal injuries or interfering with or damaging real or personal property in one's lawful possession or custody is not unlawful. (Cf. Penal Law, §§35.20, 35.25; see, also, General Business Law, §218, which affords a retail merchant a defense to an action for false arrest and false imprisonment where a suspected shoplifter is reasonably detained for investigation or questioning.) Also, a parent, guardian or teacher entrusted with the care or supervision of a child may use physical force reasonably necessary to

maintain discipline or promote the welfare of the child. (Penal Law, §35.10) *Sindle v. New York City Transit Authority*, 33 N.Y.2d 293, 297, 332 N.Y.S.2d 183 (1973)

Sindle broke no new ground; it followed an unbroken line of case law which had consistently held that the provisions of the Penal Law applied to civil as well as criminal cases. Thus, the cases cited in our Reply Brief on page 12 specifically:

Petri v. Milhim, 139 A.D.2d 652, 653, 527 N.Y.S.2d 291 (2nd Dept. 1988)

Santos v. City of New York, 135 A.D.2d 426, 430, 522 N.Y.S.2d 538 (1st Dept. 1987)

Frazier v. State of New York, 64 N.Y.2d 802, 486 N.Y.S.2d 919 (1985)

Arnold v. State of New York, 108 A.D.2d 1021, 486 N.Y.S.2d 94 (3rd Dept. 1985)

Cook v. City of New York, 82 A.D.2d 72, 441 N.Y.S.2d 104 (2nd Dept. 1981)

Herring v. City of Syracuse, 63 A.D.2d 833, 406 N.Y.S.2d 409 (4th Dept. 1978)

Stein v. State of New York, 53 A.D.2d 988, 385 N.Y.S.2d 874 (3rd Dept. 1976).

all establish that a police officer or any actor who acts in accordance with Penal Law privileges not only enjoys immunity from criminal prosecution, but from a civil damage suit as well. The Pattern Jury Instructions embodying the prevailing trend of New York case law also endorses this view. *See e.g.* 2 PJI 3:4 pp.596-98, 2 PJI 3:4 supp. 20-24. The commentary to 2 PJI 3:4 begins by explicitly noting that its summary of the law is based on Penal Law §35.30. *See also Jacobs v. State of New York*, N.Y.L.J., 3/1/91, p. 23 (Ct. Claims, 1991).

The leading national text on torts also concludes that a state's penal law sets the bounds for permissible police conduct even in the arena of a civil suit. "The courts have generally adopted the same [justification] policy concerning civil litigation the state legislatures have in defining crime." *Prosser & Keeton on Torts*, §19 p. 127.

Indeed this Court although not as explicitly as it did in *Sindle*, has often recognized that the Penal Law privileges protect a defendant from liability in civil tort suit.

Only 14 years before *Sindle*, this Court in *Fields v. City of New York*, 4 N.Y.2d 334, 175 N.Y.S.2d 27 (1958) applied the provision of the then applicable, Penal Law §1055, to determine whether a police officer would be liable in civil damages for firing his weapon to capture what he believed to be was an escaping criminal.

The court quoted with approval from an early *criminal* case, *Conraddy v. People*, 5 Parker Cr.R. 234, where a police officer faced criminal charges for firing a weapon at a fleeing criminal, and concluded that the criminal law privileges applied parameters of permissible police conduct to *civil* suits as well.

The *Fields* court also relied on an American Law Reports annotation to determine under what circumstances a police officer would be *civilly* liable for firing a weapon. The title

of the Article—"Criminal Law: Criminal Responsibility of Peace Officers For Killing Or Wounding One Who They Wished To Investigate or Identify" . . . 18 ALR 1369, did not dissuade the court from applying its conclusions to a civil tort suit.

Other Court of Appeals cases have also concluded that the Penal Law privileges apply to civil suits as well. In *Magar v. Hammond,* 183 N.Y. 387 (1906) plaintiff, a trespasser, was shot by defendant's watchman who spotted him poaching fish, a misdemeanor. In outlining the circumstances that would justify liability, the court referred to (then) Penal Code 209, and 223. It noted that even a police officer would not be privileged to shoot a criminal who was fleeing from the commission of a misdemeanor. The implication in *Hagar* was plain. Had plaintiff been guilty of a felony, the defendant could rely on the Penal Code privilege to defeat the civil suit.

Even earlier in *Burns v. Erben,* 40 N.Y. 463 (1869), this Court in dealing with a defendant's *civil* liability for false arrest looked for guidance to the criminal law (*see Burns* at p. 468). "The writers upon *criminal* law and the reported cases, so far as I have examined them, hold uniform language."

Not only this court but federal courts sitting in New York (see *Heath v. Henning,* 854 F.2d 6 [2nd Cir. 1988]), and even the United States Supreme Court in *Garner* looked to Article 35 of the Penal Law when a police officer was privileged to use force and escape civil liability (471 U.S. at 17, fn.18 and accompanying text).

New York courts have looked not only to the Penal Law, they have also looked to the Criminal Procedure Law provisions in deciding whether a police officer could be civilly liable for placing a person under arrest. CPL §140.10 allows a police officer to make a warrantless arrest if a crime was

committed in the officer's presence. This court and others have routinely held that an officer who arrests a person based on such probable cause cannot be sued in tort no longer (*see e.g. Broughton v. State of New York*, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87 [1975]). Applying this Court's reasoning here, all that the Criminal Procedure Law addresses is the question of whether a particular arrest is valid for criminal law purposes. Tort law, according to this reasoning, presents a different matter. Thus, if a plaintiff is able to persuade a civil jury that a police officer, instead of arresting him should have given him a desk appearance ticket, that plaintiff should be able to prevail.

The sharp line this Court drew between the Penal Law privileges and those governing tort actions should be rejected not only because it clashes with case law, it should be rejected because it also rests on historically flawed premises. The majority believed that the privileges contained in Article 35 address entirely different interests than those at stake in civil suit. History proves this view wrong.

Many of the Penal Law privileges simply restate or are similar to the old common law tort privileges that New York courts had traditionally applied to civil as well as criminal actions. For example, Penal Law 35.10(3) cited in the *Sindle* case allows a person in charge of a carrier to use reasonable force to maintain order on a bus or a train. §35.10 is drawn from its earlier codified predecessors, specifically §246(5) of the Penal Law of 1906 and §223(5) of the Penal Code of 1886. These provisions did nothing more than restate the earlier tort rule, which had immunized the operator of a carrier from civil liability for using force to maintain order on a bus or a train (*see e.g. Hibbard v. N.Y. R.R. Co.*, 15 N.Y. 455, 464 [1857]; *Higgins v. Watervliet Turnpike Co.*, 46 N.Y. 23 [1871]; *see also Pease v. Delaware, C. & W. R. Co.*, 101 N.Y. 367, 371 (1885).

A parent and teacher's right to use physical force to discipline a child, as codified in present Penal Law §35.10(l) and its predecessor (*see* PL 246[41]); *Penal Code* 223(4) are also restatements of the old common law tort rule (*see e.g. Starr v. Litchfield*, 40 Barb 541, 543-44 (Kings Gen. Term 1863).

The fleeing felon rule embodied in modified form Penal Law §35.30 is itself similar to the old common law tort rule. The predecessors of Penal Law §35.30 (*see* PL 1055[3]1, Penal Code §204[31]) allowed a police officer to use deadly force to capture a fleeing felon no matter what the felony, so long as the escaping felon was actually guilty for the felony. *See* 1906 Penal Law 1055(3), 1886 Penal Code §204(3). As this court recognized in *Fields v. City of New York, supra*, the justifiable homicide defense outlined in Penal Law §1055(3) was identical to the privilege that would immunize a police officer in a *civil* suit. *Fields*, 4 N.Y.2d at 339.

Other evidence also establishes that the criminal and tort privileges governing the use of force never differed. Old Penal Law §246(3) allowed a person to use reasonable force against a trespasser who was attempting to seize his property. Once again, these penal provisions drew from the well of common law tort principles (*see e.g. Gyre v. Culver*, 47 Barb 592, 593 [1867])

> The law does not oblige the owner of property to stand idly by and see a thief or trespasser take his property

Thus, the dichotomy this court understood to exist between the Penal Law privileges and those applicable to civil suits is a spurious one. The Penal Law embodies the same privilege which should apply to tort suits since the Penal Law privilege is itself derived from or identical to old common law tort privileges.

In the face of historical evidence and the overwhelming weight of case law, the unanswered question remains: why did this Court suddenly decide to render inapplicable the Penal Law privileges which had always been thought to apply to civil tort suits, too? Part of the answer may lie in the court's confused understanding of this suit as founded on "common law negligence". As a general proposition, courts are reluctant to apply black letter rules of law to simple negligence actions. *See Prosser and Keeton on Torts*, §34, p. 217-18.

The facts of a particular accident, whether a slip and fall down a staircase, or an intersection collision, vary so greatly that any black-letter rule of law would tend to be riddled with too many exceptions to prove useful. Then, too, the focus in negligence law is *retrospective*. A jury evaluates a defendant's past actions, applying hindsight, appraising the facts of a particular accident against the general standard of reasonable care.

An entirely different state of affairs applies to tort suits founded on intentional and purposeful conduct, such as police activity. Because such conduct is purposeful and often predictable, detailed rules of law such as those embodied in the Penal Law tend to prove more useful in judging whether particular conduct was justified or lawful.

Moreover, a detailed set of guidelines such as those embodied in the Penal Law serves an additional function. It allows police departments and municipalities to know in advance what conduct the legislature has determined is

permissible and which is not. Put another way, an important purpose of detailed provisions such as those contained in the Penal Law is to allow police and other officials to plan police action *prospectively*.

A detailed guide such as the one contained in Article 35 of the Penal Law is important for another reason. The question of when a police officer may use physical force is fraught with considerations of public policy. It is important that the legislature have the final word on what is or is not proper police conduct. Take the facts underlying this lawsuit for example, and assume for the moment that there is no question that Officer Rodriguez had reason to believe that unless he fired his weapon, McCummings would have escaped. May a police officer use force under such circumstances? There are strong reasons to argue that he may; admittedly, too, there are grounds, weaker ones, for arguing that a police officer should never fire a weapon except to defend himself or another.

Both positions are "reasonable" in the sense that one can offer more or less compelling arguments in support of either of them. But what is patently unreasonable is to allow a civil jury to decide these questions on an *ad hoc* basis, based solely on its own idiosyncratic view of what is or is not reasonable. What is patently unreasonable is for a Bronx jury to decide one day that it is unreasonable for a police officer to fire a weapon to capture a fleeing felon, while a Westchester jury, on another decides that it is. Such inconsistent results will inevitably flow from this court's simplistic conclusion that juries, unguided by the clear directives of the Penal Law, can now apply simple negligence standards to determine whether an officer acted reasonably.

The effect of this Court's
decision will be far reaching

The majority undoubtedly thought that it was addressing only the narrow question of whether and when a police officer could use deadly force to capture a fleeing felon. The effect of the majority's memorandum, however, will be substantially more far reaching. No longer able to rely on the clear directives of the Penal Law, ranking police officials will now be able to tell their officers nothing more instructive than that they must act "reasonably".

Police officers on the beat will follow one of two courses. The more prudent ones will hesitate to take any police action, whether it be firing a weapon, making an arrest or using simple physical force. These officers know that, if years later a civil jury concludes that the officers acted unreasonably, they could be held to answer in substantial damages. Other officers may take the opposite approach. Unguided by the clear language of the Penal Law, these officers will use their own judgment to decide what is reasonable, engaging in conduct that may pass the bounds of permissible police conduct.

Nor will this court's decision affect only police officers and officials; trial judges will also find themselves in a difficult quandary. Faced with this Court's decision tossing out large portions of the Pattern Jury Instructions, these judges will be left with the chore of crafting a new common law of justification. As the threshold of the 21st century, with guns and violence commonplace in major metropolitan areas, trial courts will now be given the chore of constructing from scratch an entirely new common law of tort justification.

Nor are the effects of the *McCummings* decision limited to police action. Article 35 covers a vast spectrum of intentional and purposeful activity. May a parent use corporal punishment to discipline his or her child (PL §35.10[1])? May a physician render emergency treatment to an uncon-

scious patient (PL §35.10[5])? May a bus driver use physical force to eject an unruly passenger (PL §35.10[3])? May a civilian facing a burglar in his home stand his ground and use deadly force to repel the intruder or must he retreat (PL §35.15[2][a][i])? For decades, lawyers and judges and the drafters of the Pattern Jury Instructions had believed that the answers to these questions were clearly and definitively set forth in Article 35 of the Penal Law. No more.

We respectfully request that the court reconsider its earlier pronouncement and declare as the law of the State of New York what it had been for decades: that the justification provisions of the Penal Law apply to civil as well as criminal cases.

POINT III

PURSUANT TO THE LAW WHICH PLAINTIFF, DEFENDANT AND THE TRIAL COURT AGREED APPLIED, THE ACTION SHOULD HAVE BEEN DISMISSED AS A MATTER OF LAW.

As has been shown at length above, both sides requested that the jury be instructed to apply *Tennessee v. Garner*, 471 U.S. 1 (1985) in reaching its verdict, and the trial court purportedly so charged. Accordingly, this case cannot be disposed of until the effect of the Supreme Court's holding in *Garner* has been fully considered. It is respectfully submitted that under *Garner*, which both sides agreed was the controlling law, plaintiff's action should have been dismissed.

It is worth noting, initially, that *Tennessee v. Garner* does not require an analysis essentially different from Penal Law §35.30 which, as shown above, has for many decades, been the controlling law in cases involving allegations of civil assault. See *Heath v. Henning*, 854 F.2d 6 (2nd Cir. 1988).

That law, also charged to the jury as setting the controlling standard for determining the Authority's liability or lack thereof, obviously called for the dismissal of the action.

Returning to *Garner*, it is illuminating to examine the very recent Eighth Circuit decision of *Krueger v. Fuhr*, ____ F.2d ____, retrievable on Westlaw (tm) at 1993 WL 103033 (8th Cir. 1993). In that case, a Missouri police officer was found entitled to summary judgment pursuant to *Tennessee v. Garner*. The officer, at the time of the incident forming the basis for the action, had been pursuing a suspect who, he had been informed by radio, had committed an assault while armed with a knife. When the officer spotted Krueger, he did not have a knife in his hand, nor did the officer see any knife on his person. Despite the officer's command to "freeze", the suspect fled. The officer testified that he heard Krueger pull an object from his waistband area and then saw a knife gripped in Krueger's fist. The police officer shot Krueger; two bullets struck him in the back and a third at the base of the skull, causing his death. Subsequently, a knife with an exposed blade was discovered 43 feet away from the point where Krueger had been shot.

The Circuit Court of Appeals applied *Garner* in determining the summary judgment motion:

> "The use of deadly force is constitutionally reasonable in certain limited circumstances. 'Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may

> be used if necessary to prevent escape, and if, where feasible, some warning has been given.' *Garner*, 471 U.S. at 11-12."

The Eighth Circuit, applying the gloss given to *Garner* by *Graham v. Connor*, 490 U.S. 386 (1989) noted that "an officer's compliance with the standard must be assessed from the point of view of a reasonable officer on the scene". The officer knew that someone fitting Krueger's description had committed an armed assault. It was objectively reasonable for him to believe "that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm". The Circuit Court did not find that the circumstance that the knife was discovered 43 feet from the body or that Krueger was struck in the back created genuine issues of fact. "Officer Fuhr maintains, and we agree, that these facts are not material to a determination of whether the shooting was objectively reasonable."

> Plaintiffs misapprehended the nature of the Fourth Amendment's reasonableness inquiry. Reasonableness must be determined from the point of view of a reasonable officer in the situation, 'rather than with the 20/20 vision of hindsight'. *Graham*, 490 U.S. 396. An erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectionably reasonable. *Id.* We have already concluded that Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable. Therefore, even assuming that plaintiffs were able to establish that Krueger was unarmed at the time of the shooting, that fact would not preclude entry of judgment for Officer Fuhr.

The court also noted that "it is not remarkable that an escaping felony suspect was shot in the back".

Continuing its *Garner* analysis, the Court next determined that the use of deadly force was necessary to prevent escape. Krueger was fleeing at the time of the shooting and, even though other police officers were in the general area, the Fourth Amendment did not require Officer Fuhr to eschew deadly force which the court finds "was necessary to prevent escape in accordance with the standards enunciated in *Garner*".

The court lastly considered the *Garner* requirement that a warning be given, where feasible".

> Officer Fuhr ordered Krueger to freeze when he first encountered Krueger lying between two cars in East Walnut Street, and several times during the pursuit. There is no evidence that he gave warning immediately prior to the shooting. However, we are satisfied that under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable.

See also: *Daniels v. Terrell*, 783 F.Supp. 1211 (E.D.Mo. 1992); *Ramos Ayala v. Diaz Martinez*, 707 F.Supp. 75 (D.P.R. 1988); *Hill v. Jenkins*, 620 F.Supp. 272 (N.D. Ill. 1985).

Officer Rodriguez' shooting of McCummings was objectionably reasonable under *Garner*. As both sides agreed that *Garner* set the governing standard, the action should have been dismissed before the prolix and confusing charge was given to the jury.

This Court's assumption that there were "issues of fact" for the jury to determine is erroneous. A genuine review of

the evidence at trial reveals that no rational jury could have concluded that Officer Rodriguez did not correctly realize that Sandusky had been the victim of a violent felony and that McCummings was one of the fleeing perpetrators. Once again, the Court is urged to look at the *actual record* and not rely on plaintiff's self-serving and grossly inaccurate recounting of events.

POINT IV

THE COURT SHOULD RECONSIDER THE OTHER POINTS THE AUTHORITY RAISED IN ITS MAIN BRIEF AND ORDER A NEW TRIAL.

This memo has shown that the majority, in its haste to affirm the judgment in plaintiff's favor, may have overlooked important and critical aspects of this case. By characterizing this suit as one founded on negligence, the majority demonstrated that it misread crucial portions of the record.

With this in mind, the Authority respectfully asks the Court to re-examine the other points raised in our briefs, specifically Points II to IV in which the Authority asked for a new trial.

Point III, we submit, deserves a close second reading. The Court will recall that plaintiff accused Officers Mead and Rodriguez of covering up their misdeeds in an earlier stop and frisk and also accused them of confronting the stop and frisk suspects as well as McCummings solely because the officers were motivated by racism.

The Authority's objection to these insinuations was exceptionally well preserved and cannot be sloughed off as harmless. To begin with, the jury, during its deliberations, asked the court to allow it to review copies of the stop and

frisk memos (1922). Then, too, one can hardly imagine a more damaging charge than the charge of racism that plaintiff's counsel levelled against the Authority.

These improprieties are far more serious than the ones this Court condemned in *DiMichel v. South Buffalo Railway Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992) and *Badr v. Hogan*, 75 N.Y.2d 629, 555 N.Y.S.2d 249 (1990), cases in which this Court granted new trials. For these reasons we respectfully request that the Court reconsider its earlier decision and grant a new trial.

CONCLUSION

The Court should reconsider its affirmance of the judgment in plaintiff's favor, dismiss the suit or order a new trial.

Dated: Brooklyn, New York
April 30, 1993

Respectfully submitted,

ALBERT C. COSENZA
Attorney for Defendant-Appellant
NEW YORK CITY TRANSIT
AUTHORITY
TORTS DIVISION, Rm. 1147
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718-694-3851

LAWRENCE HEISLER
LAWRENCE A. SILVER
Of Counsel

APPENDIX M—Verdict Sheet.

SUPREME COURT, NEW YORK COUNTY
IAS PART 23

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85

Justice Leonard N. Cohen

VERDICT SHEET

In order to constitute a verdict as to each answer, at least five (5) jurors must agree to the answers to each question although all jurors should participate in all deliberations.

The answer to each question need not be by the same five (5) jurors.

1. Did Police Officer Manuel Rodriguez use deadly force unjustifiably on June 28, 1984 against the plaintiff Bernard McCummings?

(At least any *five* jurors must agree on the answer to this question)

Yes √ 6-0

If Yes, proceed to Question 2.

If No, end your deliberations and go no further.

2. Separately state the full total dollar amount of damages for which the plaintiff, Bernard McCummings, is entitled to recover against the defendant Transit Authority as to *each* of the following *items* of damages.

(At least any *five* jurors must agree on the *answers* to *each* of the following items of damages)

a) Pain and suffering from June 28, 1984 to date.

$500,000. 6-0

b) Future pain and suffering including the permanent effect of the injuries.

$2.0 million 6-0

c) Future medical supplies and equipment.

$622,142.55 6-0

d) Future nursing and other home care services.

$1,220,000 6-0

(If none as to any of the above, state none)

APPENDIX N—Colloquy Re: "Negligence".

(1694) THE COURT: What interrogatories are you requesting?

MR. KUZMACK: I would request a question as to whether they found that the officer was lunged at and fired as a result of that.

THE COURT: What else?

MR. KUZMACK: Whether they found that the plaintiff was at the bottom of stairway PL-6; and that the officer fired from the landing, as he attempted to escape.

THE COURT: And what? Attempted to escape?

MR. KUZMACK: And that he fired as he attempted to escape.

THE COURT: All right.

MR. SIERADZKI: Those are the two factual issues.

* * *

(1695) THE COURT: I will deny that request and put it to the jury just as we do in any negligence case: Was the defendant negligent in the operation or (1696) control over the motor vehicle?

We don't go into the details. I don't think it's warranted here.

* * *

APPENDIX O—Respondent's Notice of Claim.

IN THE MATTER OF THE CLAIM OF

BERNARD MCCUMMINGS

against

THE NEW YORK CITY TRANSIT AUTHORITY and THE NEW YORK CITY TRANSIT POLICE

TO: The New York City Transit Authority and The New York City Transit Police.

PLEASE TAKE NOTICE that the undersigned claimant(s) hereby make(s) claim and demand against the New York City Transit Police as follows:

1. The name and post-office address of each claimant and claimant's attorney is:

Claimant (*pro se*): Bernard McCummings, 1212 Great Avenue, Apartment 5B, Bronx, New York

2. The nature of the claim: On or about June 28, 1984, Claimant was shot twice in the body by a police officer or transit police officer of the City of New York. This shooting resulted in permanent paralysis of the Claimant's lower limbs. On or about that same date, Claimant was fasely

arrested. Thereafter, his constitutional and civil rights were violated. He was phychologically and physically abused, he was defamed, he was illegally imprisoned for a period of many days, maliciously prosecuted and forced to be present in Court, even though the City of New York and the Transit Police Authority knew that there was no merit to the continuance of the prosecution and that such prosecution was malicious and the imprisonment illegal.

* * *

APPENDIX P—Description of Victim's Condition by Transit Detective Carrera.

(382) Carrera—by Plaintiff—Direct

Q. Mr. Breitbart:

Now, in addition to interviewing Mr. Sandusky, he was very angry at my client in a yes or no?

Det. Carrera: He was angry. He was also very traumatized.

* * *

APPENDIX Q—Description of Victim's Condition by Transit Captain Kelly.

(424) Captain Kelly:

A. Well, there were actually four, if you include the complainant. But, as far as I understood from the complainant, he was choked almost to unconsciousness, so he essentially wasn't there, or at least wasn't conscious.

A. I think I put in there that he said he doesn't remember because he was semi unconscious from the strangling. That's what I understand. Can I see my report?

Q. Certainly. I think it is right in front of you.

(Handed)

Q. In addition to your report, did you review all available information to you at the (425) time you issued your report?

A. He indicated being near unconscious from the stranglehold on his neck and was unclear as to the officer's action or the shots. It's in the endorsement in the fourth paragraph down. So, you have the officer—

* * *

(436) THE WITNESS: The officer. Like I said, there is only three people there who know what happened, at least from what they tell me. The complainant is semi-unconscious, okay and he is bleeding, by the way. He is a 71 year old man, feisty little bastard.

Oh, you met him? I said the same thing, "God bless you."

* * *

APPENDIX R—Excerpt From Petitioner's Trial Summation.

(1673) The plaintiff is going to claim that there is a cover up in this case, that because the shooting wasn't justified all of the cops got together and decided they would cover it up to save one officer.

I ask you to listen very carefully to the Judge when he charges the law to you because even if this occurred the way the plaintiff says it did with Mr. McCummings being shot in the back at the bottom of PL6 rather than at the landing, under the law as you will hear it from the Judge, Mr. Rodriguez, Officer Rodrigues was justified in shooting.

There was no reason for a cover up. He was justified either way.

* * *

APPENDIX S—Respondent's Brief in *Flamer v. City of Yonkers.*

To be argued by
J. Raymond Hannon

Court of Appeals

OF THE STATE OF NEW YORK

Amanda Flamer, as Administratrix of the Goods, Chattels and Credits of Thomas Franklin Wilson, Deceased,
Plaintiff-Appellant,

against

The City of Yonkers, Allison Hopper and Frank Porach,
Defendants-Respondents.

RESPONDENTS' BRIEF

Statement.

This is an appeal from an order of unanimous affirmance entered on the 24th day of May, 1954, in the office of the Clerk of the Appellate Division of the Supreme Court, Second Department, and the judgment entered thereon in the office of the Clerk of Westchester County on the 7th day of June, 1954, which order and judgment unanimously affirmed a final judgment of the Supreme Court, Westchester County, entered in the office of the Clerk of the County of Westchester in favor of the defendants and against the plaintiff in an action brought by the administratrix of the estate of Thomas Franklin Wilson, deceased, to recover for the alleged wrongful death of said deceased. The amended complaint (fols. 16-37)

sets forth three causes of action, the first for alleged negligence on the part of the defendants in using more force than was necessary to make an arrest and in handling of a firearm; the second for an alleged assault upon the deceased and the third for alleged negligence of the defendant City of Yonkers in retaining the defendants Hopper and Porach as members of the Police Force and permitting said defendants to carry a gun. In the third cause of action plaintiff alleges that the defendant City of Yonkers had knowledge or could have acquired knowledge of the viciousness of the defendants Hopper and Porach.

Defendants' answer (fols. 40-57) admits that, at the time and place referred to in the amended complaint, the defendants Allison Hopper and Frank Porach were in the course of their employment with the defendant, The City of Yonkers, and that the defendant Hopper then and there shot plaintiff's intestate with a lethal weapon resulting in his death; that a purported notice of claim was served within sixty days of the occurrence; that more than ninety days elapsed since the presentation of said alleged claim; that no settlement or adjustment of the said alleged claim was made and that the action was commenced within one year from the date of said occurrence, and denies each and every other allegation contained in paragraphs numbered "5", "6", "7", "8", "9", "10", "11", "13", "14", "15", "16", "17", "18", "19", "20" and "21" of the amended complaint. As a separate and complete defense to the allegations contained in the first, second and third causes of action, defendants allege that any injuries sustained and suffered by or causing the death of plaintiff's intestate were caused in whole or in part or were contributed to by the negligence and want of care of the plaintiff's intestate and not by any negligence or want

of care on the part of defendants or any of them (fols. 46-47); that, at the time and place mentioned in the amended complaint, plaintiff's intestate was in a fight with and assaulting an unidentified person in breach of the peace (fol. 51); that the defendants, Allison Hopper and Frank Porach, in the course of their employment as police officers of the City of Yonkers, in order to preserve and restore peace, ordered said plaintiff's intestate to stop said fight and assault and laid their hands upon him as they lawfully might using no more force than was necessary for said purpose (fols. 51-52); that thereupon plaintiff's intestate first assaulted the defendant Porach and assaulted and threatened further to assault the defendants Hopper and Porach, whereupon said defendant Hopper necessarily committed in self defense and in defense of the defendant Porach the acts set forth in the amended complaint (fols. 52-53), and that any injuries sustained and suffered by or causing the death of the plaintiff's intestate were caused in whole or in part or were contributed to by the negligence and want of care of plaintiff's intestate and not by any negligence or want of care on the part of the defendant, The City of Yonkers (fols. 55-56).

On April 21st, 1952, this action came on for trial before Mr. Justice Doscher and a jury at a trial term of the Supreme Court, Westchester County. At the conclusion of plaintiff's case, with the exception of the testimony of Dr. Spain, defendants, by their attorney, moved to dismiss the third cause of action on the ground that plaintiff had failed to prove the allegations of said cause of action (fol. 555) which motion was granted by the Court (fol. 558). The Court, at the close of plaintiff's case, reserved decision on defendants' motion to dismiss the first cause of action (fols. 1198-1204) and denied defendants'

motion to dismiss the second cause of action (fols. 1204-1205). At the close of the case the Court granted defendants' motion to dismiss the first cause of action (fol. 1541), denied defendants' motion to dismiss the second cause of action (fol. 1542), and submitted to the jury the second cause of action the jury returning a 10-2 verdict for the defendants (fols. 1618-1619).

Facts.

On August 26th, 1949, plaintiff's intestate, Thomas Franklin Wilson, and his nephew, Harold Flamer, met at about 9:30 P. M. at Flamer's house (fol. 120), and, after visiting four different grills or bars (fols. 122, 131-134) and the house of a lady (fol. 135) and drinking beer, about eight beers apiece (fol. 144), went to the Columbia Bar and Grill on New Main Street, Yonkers, between twelve-thirty and one o'clock (fols. 79-80). Flamer testified that they started wrestling and that the bouncers told them to break it up (fols. 82-84, 147, 164). At the request of the bouncer (fols. 161-164) and the head bartender (fol. 564) Eugene Fernandez, the other bartender, called the police (fols. 664-665). After Fernandez called the police Wilson said "Go ahead and call the cops again, no cop in Yonkers takes me out of here alive" (fol. 676).

Before the arrival of the police there was a fight (fol. 665) and on their arrival the police broke up the fight and held Wilson (fols. 665-666, 736-750) who put up a fight making it necessary for one of the policemen to hit him (fol. 666). Wilson snatched the nightstick away from one of the policemen and hit him alongside of his head (fols. 283, 306-310) knocking him down (fols. 903-907, 954-955, 959-961). The other police officer, Hopper, told Wilson to drop the stick

(fols. 907-908, 1062). Wilson was coming at Hopper holding the stick up above his head (fol. 1064). Wilson took three lunges at Hopper (fol. 1346) and was in the process of striking Hopper with the night stick when Hopper shot him (fol. 1452). Prior to the shooting Hopper told Wilson to put the stick down. Instead of complying Wilson made a lunge. Hopper backed up and Wilson came after him the second time and Hopper told him to "put the stick down or I will give it to you" (fols. 1241-1242). Upon Wilson's failure to comply Hopper pulled his gun and shot him (fol. 1242).

POINT I.

Defendants were not required to point out the material allegations not proven by the evidence in moving to dismiss the first cause of action.

Plaintiff's first cause of action was for negligence the plaintiff alleging use of excessive force in making an arrest and the negligent handling of a firearm resulting in the death of plaintiff's intestate (fols. 21-23).

At the conclusion of plaintiff's case, defendants, by their attorney, moved to dismiss the first cause of action on the ground that the plaintiff had failed to prove that cause of action against the defendants, there being no evidence in support of the allegations of negligence and no proof of any arrest (fols. 1198-1199). The Court reserved decision on the motion (fols. 1203-1204). At the close of the case the Court granted defendants' motion to dismiss the first cause of action (fol. 1541).

Plaintiff-appellant urges in Point II of her brief that on a motion to dismiss at end of plaintiff's

case, defendant must point out the particular material allegations not proven by the evidence.

In a negligence action, a motion to dismiss on the ground that no negligence has been shown is sufficiently specific, it is not necessary to go into details to show why the defendant claims that no negligence has been shown, or in what particular respect the plaintiff has failed in his proof.

Byrnes v. *N. Y., L. E. & W. R. R. Co.*, 113 N. Y. 251;
Carmody-Wait Cyclopedia of New York Practice, Vol. 6, page 698.

When the plaintiff has put in his evidence such evidence may not sustain the allegations of a cause of action and, under such circumstances, a motion to dimiss such a cause of action should be granted.

Collelli v. *Turner*, 154 App. Div. 218, affd. 215 N. Y. 675;
Carmody-Wait Cyclopedia of New York Practice, Vol. 6, page 697.

Where plaintiff's evidence is equally consistent with the absence as with the existence of negligence a motion to dismiss may properly be granted, and the case should not be submitted to the jury since, in such a case, the evidence fails to establish an essential fact, and a *prima facie* case has not been made out.

Fearick v. *Lehigh Valley Railroad Co.*, 210 App. Div. 742, 747.

In reserving decision on the motion to dismiss the first cause of action at the conclusion of plaintiff's case, the Court, at Trial Term stated "I will reserve decision because I'd like to check on that matter a little further".

It is respectfully submitted that plaintiff failed to prove the first cause of action and that the Court properly granted defendants' motion to dismiss said cause of action.

POINT II.

Plaintiff's third cause of action was properly dismissed.

In her third cause of action plaintiff alleges that the defendant, City of Yonkers, was negligent in that it knew of the vicious propensities of the defendants Allison Hopper and Frank Porach and despite such knowledge failed to remove them from the Force and the said defendant, City of Yonkers, was further negligent in that it retained said police officers upon the Police Force of the City of Yonkers knowing that the said police officers were incompetent and ill-tempered persons; and the said defendant, City of Yonkers, was further negligent in that knowing of said viciousness of the said officers it, or its representatives, officers or agents, permitted and allowed said police officers to carry a lethal weapon, to wit, a gun and that the said defendant, City of Yonkers, was further negligent in that, upon a reasonable inspection or investigation, it could have acquired knowledge of the viciousness of said police officers (fols. 33-36).

No testimony was offered by plaintiff to prove the aforementioned allegations and, at the conclusion of plaintiff's case, with the exception of the testimony of Dr. Spain, defendants, by their attorney, moved to dismiss this cause of action on the ground that plaintiff had failed to prove the allegations of said cause of action (fol. 555) which motion was granted by the Court (fol. 558).

The failure of plaintiff to prove the allegations of this cause of action warranted the granting of defendants' motion to dismiss said cause of action.

CONCLUSION.

The judgment and order should be affirmed with costs.

Respectfully submitted,

J. Raymond Hannon,
Corporation Counsel,
Attorney for Defendants-Respondents,
Office & P. O. Address,
City Hall,
Yonkers, N. Y.

APPENDIX T—Excerpt From N.Y. Pattern Jury Instruction §3:3.

b. Battery

(1) Generally

PJI 3:3. Intentional Torts—Interference with Person or Property —Battery—Generally

One who in a (hostile, offensive) manner touches the person of another, without his consent and with the intention of causing (harmful, offensive) bodily contact to (such other, a third person), commits a battery and is liable for all damages resulting from his act.

Plaintiff claims that defendant *([describe act, such as:—]* struck him in the face, fracturing his jaw). Defendant *([state claim, such as:—]* admits that he struck plaintiff, but defendant says that he did not do so intentionally but while hysterical).

Intent involves the state of mind with which an act is done. It means the desire to bring about a result. If a person acts voluntarily with the desire to bring about a result, he is said to have intended that result. Further, although he has no desire to bring about the result, if he does the act under circumstances known to him which make it substantially certain that the result will follow, he is also said to have intended the result.

If you find that defendant voluntarily *([describe act:]* struck plaintiff in the face) and that he intended to cause (harmful, offensive) contact to plaintiff, you will find that defendant committed a battery. If you find that defendant did not voluntarily *([describe act:]* strike plaintiff in the face) or that while he did so, he did not intend to cause (harmful, offensive) contact to plaintiff, you will find that defendant committed no battery.

Comment

Based on Masters v Becker, 22 AD2d 118, 254 NYS2d 633; Clayton v Keeler, 18 Misc 488, 42 NYS 1051; see Schloendorff v Society of New York Hospital, 211 NY 125, 105 NE 92; Noonan v Luther, 206 NY 105, 99 NE 178; and see generally Prosser & Keeton, Torts (5th Ed) 39, § 9; 1 Harper & James, The Law of Torts, 211, §§ 3.1–3.3; Restatement, Second, Torts §§ 13–20; 6 NY Jur 2d 191, Assault-Civil Aspects. Battery differs from assault in that battery requires actual contact, whereas assault does not, see Comment, PJI 3:2, supra, Supp.

Since the same act may constitute battery or negligence depending upon whether or not it was intentional, Jones v Kent, 35 AD2d 622, 312 NYS2d 728, it will often be necessary to submit both issues to the jury, Flamer v Yonkers, 309 NY 114, 127 NE 838, although there cannot be recovery for both, Murray v Long I. R. R. Co. 35 AD2d 579, 313 NYS2d 610, affd 28 NY2d 849, 322 NYS2d 248, 271 NE2d 227; Rafferty v Arnot Ogden Memorial Hospital, 140 AD2d 911, 528 NYS2d 729. However, if the only inference that may be drawn from plaintiff's evidence is that defendant's contact with plaintiff was intentional, plaintiff may recover only in battery and the issue of negligence should not be submitted to the jury, Mazzaferro v Albany Motel Enterprises, Inc., 127 AD2d 874, 515 NYS2d 681; see Panzella v Burns, 169 AD2d 824, 565 NYS2d 194.

APPENDIX U—Respondent's Summons and Complaint.

Summons

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BERNARD MCCUMMINGS,

Plaintiff

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant

Plaintiff designates New York County as the place of trial.

The basis of the venue is PLACE OF OCCURRENCE.

Plaintiff resides at 1212 Grant Avenue, Bronx, New York, County of Bronx.

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the com-

plaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, New York
May 30, 1985

MORRIS J. EISEN, P.C.,
Attorney(s) for Plaintiff

Post Office Address

233 Broadway
New York, New York
(212) 766-8200

Defendant's address:

NEW YORK CITY TRANSIT AUTHORITY
370 Jay Street, Brooklyn, New York

Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Plaintiff, by his attorney, MORRIS J. EISEN, P.C., for his verified complaint, upon information and belief, respectfully alleges:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff, BERNARD McCUMMINGS, was and still is a resident of the State of New York and resides at 1212 Grant Avenue, Bronx, New York.

2. That at all times hereinafter mentioned, the defendant, NEW YORK CITY TRANSIT AUTHORITY, was and still

is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York.

3. That on September 26, 1984, the plaintiff served upon the New York City Transit Authority, his Notice of Claim, setting forth the time when, the place where and the manner in which the claim arose; and that said notice of claim was served within ninety days of the date of occurrence herein.

4. That more than thirty days have elapsed since the presentation of said notice of claim, and no adjustment or payment has been made by defendant, NEW YORK CITY TRANSIT AUTHORITY.

5. That at the request of the defendant, NEW YORK CITY TRANSIT AUTHORITY, plaintiff, BERNARD McCUMMINGS, has submitted to an oral examination on May 30, 1985.

6. This action is being commenced within one year of the date of the occurrence herein.

7. That at all times hereinafter mentioned, the defendant, NEW YORK CITY TRANSIT AUTHORITY, maintained an organized police department and police force as a unit and agency of the New York City Transit Authority.

8. That at all times hereinafter mentioned, Manuel Rodriquez, shield number 3454, was an employee of the defendant, NEW YORK CITY TRANSIT AUTHORITY, assigned for duty as a police or other officer with the police department of said defendant.

9. That beginning on or about June 28th, 1984, Manuel Rodriquez, at the times and upon the occasions hereinafter specified, was acting as an employee of the defendant, NEW YORK CITY TRANSIT AUTHORITY, in the course of his employment and the scope of his authority and in furtherance of the interest of his employer, the defendant, NEW YORK CITY TRANSIT AUTHORITY.

10. That on June 28th, 1984, in the vicinity of the subway station located at 96th Street and Central Park West, in the Borough of Manhattan, City and State of New York, BERNARD McCUMMINGS was carelessly and negligently assaulted, battered and shot without justification and under circumstances which did not justify said actions, by police officer Manuel Rodriquez and other unknown New York City Transit Authority police officers.

11. Said occurrence and resulting severe and serious injuries which the plaintiff was caused to suffer, were due solely to the negligence, recklessness and excessive force of the defendant's employees.

12. That as a result of said excessive force, negligence and unlawful conduct, plaintiff was severely and seriously injured, both bodily and mentally.

13. That by reason of the foregoing, the plaintiff has been damaged, through no fault of his own, by the defendant, NEW YORK CITY TRANSIT AUTHORITY, in an amount which exceeds the jurisdictional limits of all lower courts.

FOR A SECOND CAUSE OF ACTION

14. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs "1" through "13" inclusive with the same force and effect as if hereinafter set forth at length.

15. That defendant, NEW YORK CITY TRANSIT AUTHORITY, its agents, servants and/or employees, were negligent in the screening, training and supervision of its employees, and failed to take all necessary and proper steps to prevent the aforesaid occurrence; and the defendant was otherwise negligent.

16. That the aforesaid occurrence and resulting severe and serious injuries to the plaintiff occurred without any fault or wrongdoing on his part.

17. That by reason of the foregoing, plaintiff, has been damaged in an amount exceeding the jurisdictional limits of all lower courts.

FOR A THIRD CAUSE OF ACTION

18. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs "1" through "17" inclusive with the same force and effect as if hereinafter set forth at length.

19. That the defendant, their agents, servants and/or employees, acted under color of the statutes, ordinances, regulations, customs and usages of the State and City of New York, in their assault, battery and shooting of plaintiff and

their action deprived BERNARD McCUMMINGS of his rights, privileges and immunities secured by the Constitution of the United States of America and the laws thereunder, pursuant to title 42 United States Code §1983.

20. That by reason of the foregoing the plaintiff has been damaged, through no fault of his own, by the defendant, NEW YORK CITY TRANSIT AUTHORITY, in an amount which exceeds the jurisdictional limits of all lower courts.

* * *

APPENDIX V—Excerpt From Respondent's Opening.

(36) And we will show you by charts and measurement that was some 17 or 18 or 20 feet away from where he says shots were fired. And the other ran off down the station with Patrolwoman Christine Mead in pursuit.

* * *

APPENDIX W—Excerpt From Respondent's Trial Testimony.

(937) Q. I direct your attention, Mr. McCummings, to May 30th, 1985 at Greenhaven Correctional Facility, I believe you testified on direct examination that you underwent a statutory hearing, an examination by an attorney representing the Transit Authority, is that correct?

A. Correct.

Q. And you were represented by an attorney named Paul Sclietroma, at that time, is that correct?

A. Correct

Q. And you had a chance to review this document before testifying, is that correct?

(938) A. Correct.

Q. And at that time you took an oath to tell the truth, the same as you did here, is that correct?

A. Correct.

Q. Page 18, were you asked the following question and did you give the following answer?

* * *

Q. Were you asked this question and did you give this answer, line 21:

> "QUESTION: Can you tell us under what (939) circumstances you were shot?
> "ANSWER: Me and my friend was walking out of the train station to the exit and one of my friends grabbed a man and I got shot. I said what are you doing?"
> Do you remember being asked that question and giving that answer?

A. No.

Q. Did you give that answer to that question?

A. No. Excuse me, yes, I did. I had to give that answer if it's there in the book, sure. But, I don't remember it.

* * *

APPENDIX X—Excerpts From Trial.

(1153) *Proceedings*

THE COURT: Let me look at it. And also 32.

MR. KUZMACK: There are two pages of each, your Honor.

MR. BREITBART: Your Honor, this application is being made out of context. If your Honor recalls Captain Doyle was called to testify by the defendant. Several times during the course of the plaintiff's case I attempted to offer the '86 guidelines and your Honor kept them out because of objection by Mr. Kuzmack.

On cross-examination I asked questions of Captain Doyle which lead, during redirect examination of Mr. Kuzmack, to ask Captain Doyle what would you have done using these guidelines. I am talking in words and substance now. It is only at that juncture when he opened the door and placed the new guidelines into evidence in the case by trying to accomplish through the back door what he couldn't accomplish through the front door that I then again on recross asked questions of the captain. It became apparent that the new guidelines were a codification of the case of Garner versus Tennessee, and only at (1154) that time after your Honor indicated that he had asked the question that opened the door to that issue that I offered the guidelines, and they were then admitted. They were not admitted *ab initio*. They were only admitted because he asked the question that opened the door and that question in words or substance was: "Captain Doyle what would you have done using the new guidelines?" And the captain's response, flippantly, was: "I would have found it was a good shooting also."

And it was only at that time that they became relevant to this Court.

MR. KUZMACK: May I finish, your Honor?

THE COURT: Yes.

MR. KUZMACK: I will submit the following two cases to the Court. The first is Crossland versus the New York City Transit Authority 68 New York 2nd 165. I have a copy for the Court as well, your Honor. I would submit under Crossland the Court said the Appellate Division correctly concluded that liability cannot be based upon the alleged breach of (1155) Transit Authority Rule 85 which, as in the portion quoted above, imposed a duty higher than the Authority actually has, i.e. to exercise ordinary care commensurate with the existing circumstances. Indeed the rule would be inadmissible at trial for the same reason.

I will tie this together, your Honor.

THE COURT: One moment. I thought that you had said that Garner applied—was the law that applied to this case as well as the Penal Law. You have said that. Is that not so?

MR. KUZMACK: What I believe I said was that I was not disputing the fact that several cases applied Garner retroactively.

THE COURT: No. I was under the impression that you said that therefore Garner applied to the facts in this case.

MR. KUZMACK: Now, if Garner does apply to the facts in this case, the 1986 regulations impose a higher duty than Garner.

THE COURT: That is not what Doyle testified to. Doyle testified on his cross or recross that 16.0, whatever it is, of the police guidelines rules and regulations of 1986, this is (1156) his testimony, codify the Garner rule as to when a police officer uses deadly force with respect to an unarmed fleeing felon. That's what my notes indicate.

MR. KUZMACK: That, your Honor, I would submit is a captain's interpretation of the law. He is not a trained lawyer.

THE COURT: I understand all of that. But he is an expert in that respect, too, in the sense of several of these police officers testified as experts in the area of when a police officer uses deadly force, and it was his testimony that stated that the '86 rules and regulations codify Garner, which does apply to this case.

MR. KUZMACK: They codified Garner to some degree, your Honor. I don't believe he was referring to the entire two pages. What I would submit to the Court—

THE COURT: I am submitting when deadly force is used by a police officer.

MR. KUZMACK: What I would submit to the Court is even if they codify Garner letter for letter, the rules and regulations that were (1157) in existence in '86 shouldn't be admitted into evidence.

THE COURT: If Garner applies—let me ask Mr. Breitbart. We do have rules and regulations of '82?

MR. BREITBART: That's correct, sir.

THE COURT: Is it your view that the '82 rules and regulations, did they in any way codify Garner?

MR. BREITBART: Of course not. Garner didn't happen until 1985.

THE COURT: So the '82 regulations had a standard which was a little less than Garner.

MR. BREITBART: Garner in it's language, the Supreme Court in Garner, Judge, said that New York has the most stringent requirements in the United States, and that they were using the New York guidelines as a means of making a determination for the entire country. But Garner made unconstitutional every statute and every guideline that did not use a reasonable man standard when interpreting a shooting. They indicated that a shooting was a seizure under the Fourth Amendment and that you had to use the (1158) Fourth Amendment reasonable man standard in making that

determination and it made unconstitutional every statute or guideline in the United States that did not follow that. And subsequent cases, especially in this circuit, have interpreted Garner to be retroactive.

THE COURT: Let me ask you with respect to the '82 rule and regulation, it does mention when deadly physical force is to be used. It does not mention anything as to a fleeing unarmed felon, there is nothing in it about it?

MR. BREITBART: Judge, may I just make one further point?

Not only were you correct about what Mr. Kuzmack said, but he said he is happy that this Court is using Garner, that he wants Garner to be applied to this case and he coincides, he agrees with the plaintiff's counsel that Garner is the law of this case.

THE COURT: I will apply Garner. But all I am saying is the '82 regulation really is not a regulation that deals with the use of deadly force when there is a fleeing felon, forget armed or unarmed. It does say you can use (1159) deadly physical force when any other level of force is insufficient to effect police control of a felony involving physical force or imminent use of physical force against one's self or another. That is not the law as applied to this case.

MR. KUZMACK: And, your Honor, I would submit that the 1986 rules and regulations are not another law either. They are the rules and regulations of the Transit Authority, which may be higher or maybe lower than what the law says.

In this case, I would submit, they are higher than what the law says they have to be, and I would submit that since they are couched in terms that are, in essence, legalese, the jury would be confused if confronted with that, and any charge based on the justification section of the Penal Code 35.30 and/or Garner verses Tennessee.

I have just one more case to quote, your Honor. Caputo versus the New York City Transit Authority. The Court said—the cite, I believe the cite is 86 Appellate Division 2nd 883. The quote, your Honor, is again referring to the Transit Authority rule. It says:

(1160) "Parts of Rule 85 of Transit Authority rules and regulations were improperly submitted to the jury for consideration. The rule is couched in language similar to that of a legal standard and as a matter of law contains provisions which constitute a higher than reasonable standard of care. By submitting the provisions to the jury for consideration the jury may have been confused as to the proper standard notwithstanding the limited instructions as to the rules of applicability."

Your Honor, I would submit that in reading the 1986 rules and regulations in their entirety, not just taking out the sentence, but as of this moment, they are being submitted in their entirety, that it is a higher standard than Garner lays down in it's dicta or it's holding. And it is a higher standard than is given to us in the jurisdiction statute in the Penal Law 35.30.

And I would ask, based on that, on these two rulings by the courts that the plaintiff's—that you reconsider the admission of Plaintiff's 32 and take it out of evidence and (1161) away from the jury at this time.

If I may, your Honor, I will just hand up the two copies of the cases that I read.

THE COURT: I can't say necessarily that the '86 rules and regulations are a higher standard than those of Garner. Or a greater standard. There has been testimony by the police officer who said that the '86 rules codified Garner. Garner is the law that applies to this case. And I don't—you are just saying that it is a greater standard, as a matter of law it is a greater standard. I don't necessarily find that to be the

case. In what way do you say it's a greater standard? It seems to me it is consistent with Garner.

MR. KUZMACK: Your Honor, I will just point out one area.

THE COURT: It may well be their statement that the firearm should be used as a defensive weapon and not a tool of apprehension, well Garner didn't deal with that maybe implicitly. But I think it does state the '86 rules and regulations state that when deadly physical force should not be used to effect the (1162) arrest of a fleeing felon. And it also indicates other conditions that the police officer must meet, or the factors that the police officer must meet before using deadly force. All of which are consistent with Garner.

Were they inconsistent?

MR. KUZMACK: I believe the first inconsistency is under D, your Honor, the statute states that deadly physical force shall not be used unless the officer has probable cause to believe that, and number one is, deadly physical force was used or threatened by the perpetrator.

THE COURT: That is consistent with Garner.

MR. KUZMACK: No, your Honor. I believe Garner says serious physical force was used or threatened by the perpetrator.

THE COURT: Well, deadly physical force is more serious.

MR. KUZMACK: Is a more serious standard.

THE COURT: So Garner had less stringent—

MR. KUZMACK: That is exactly what I am (1163) arguing, your Honor, that the '86 regulations are more stringent than Garner and therefore would mislead the jury into believing that the Transit Authority had the duty to follow their own regulations legally as opposed to departmentally.

THE COURT: I see.

How do you answer that?

MR. BREITBART: It is not even an issue here. The only reason your Honor admitted this at the time you admitted it, is because he opened the door by asking questions how the captain would have applied the '86 guidelines.

How could the jury make a determination on the credibility of that witness and the applicability of the '86 guidelines without having an opportunity to see the '86 guidelines? And that was the issue at the time that your Honor reconsidered and then admitted them into evidence.

As far as the Garner standard is concerned, and as far as the New York Police standard, I don't see that that has any relevance to this argument.

THE COURT: Regardless of what Doyle (1164) said or testified to, what is your view as to whether or not the rules and regulations are of a higher or a greater standard than what Garner requires?

MR. BREITBART: I think he would have to introduce evidence in chief to make that out. He can call an expert to say that. But I don't think there is anything in this record for us to make such a determination. He has already acquiesced that Garner is the law of the case.

THE COURT: The only problem is they do have these rules and regulations in '86, and then I would have to instruct the jury that these rules and regulations were not in effect in 1984 and that the sole purpose of the rule and regulations being admitted into evidence was to determine whether or not Doyle was credible in terms of his testimony.

But as to whether or not the rules and regulations were in effect in 1984, I would have to instruct them that they were not, although they have it in front of them. It would seem to me that the only reason why the rules and regulation was admitted was because of the expert (1165) testimony by Doyle that they codified Garner. Now he may be incorrect and it appears that you may be right.

MR. BREITBART: I have no objection to that, Judge. That is the purpose for which they were offered.

THE COURT: That all it does is test his credibility. But the '86 rules and regulations, at least so far as that Subdivision 16.0 little D-1 does require a higher standard than Garner requires, that's true.

MR. BREITBART: We have no objection to that for charging.

THE COURT: I would have to instruct them that that rule does not apply.

MR. KUZMACK: Your Honor, I would submit that on the basis of the Crossland, the Caputo and Crossland, the instruction may not be enough at the time of giving the instructions. If we got the—first, as to Captain Doyle's attack by Mr. Breitbart on his credibility, I would submit that—withdrawn.

The Crossland and Caputo cases state, basically, your Honor, that even an instruction (1166) limiting the use of these regulations, since they require a higher standard—

THE COURT: You may be right that by admitting it, it may not be sufficiently clear to the jury since they will have had the opportunity to look at that rule and regulation, and they may feel that the officer was to use deadly physical force only if deadly physical force was used and threatened by the perpetrator, and actually that is greater force than just serious physical force.

I think—it would just seem to me that maybe you are right, Mr. Kuzmack, that the rules and regulations shouldn't be an exhibit before the jury because I will not be charging that that is what applies in 1984. I will be charging Garner, and I haven't heard the whole case yet, but I think I have an idea on what the credibility is in terms of the two stories. And the rules and regulations, despite what Doyle said, do

not exactly codify the Garner rule, which I would be charging.

MR. BREITBART: Except he was the teaching officer who was doing what he thought (1167) and teaching what he thought was his understanding, and that was the purpose of cross-examination.

THE COURT: You may be correct. But he was testifying about a 1986 rules and regulations. I don't believe—all I am saying is that may be true, but I will not be charging this rule and regulation being in effect, the '86 one. I don't know by my instructing them to disregard it for purposes of whether that is the law as to when deadly force may be used, I don't know whether such a curative instruction is sufficient, and they have the document in front of them, or could have the document in front of them as well as hearing Police Officer Doyle's testimony.

MR. KUZMACK: I would submit, your Honor, they would be confused afterwards.

THE COURT: I think it would be confusing.

MR. BREITBART: Why don't we redact any part that your Honor feels is inconsistent with Garner.

THE COURT: I can't do that. I can't (1168) give them a rule and regulation of 1986. I would have to interpret this rule and regulation as to it's consistency with Garner.

Aside from that provision which you just read, Mr. Kuzmack, and which I read, are there any other inconsistencies with Garner?

MR. KUZMACK: Yes, your Honor.

B, the firearm shall be viewed as a defensive weapon.

THE COURT: That is true, it is not even referred to in Garner.

MR. BREITBART: Captain Doyle testified that that is the case.

THE COURT: That is his testimony. They have the testimony.

MR. KUZMACK: Everything below the departmental policy prohibits the use of, on page 1 of exhibit 32, is in addition to Garner.

THE COURT: I don't agree with you. Five I think is consistent with Garner.

And so is four. It is directly from Garner.

MR. KUZMACK: Your Honor, I believe taken in their entirety, the entire section says (1169) in addition department policy prohibits—

THE COURT: In addition, that is true. But I would say if you deleted in addition.

MR. KUZMACK: Prohibits the use of deadly physical force unless all of the following factors are present. And I believe if you take four, five, six together you have something that is in excess of the guidelines laid down by Garner.

MR. BREITBART: Judge, we have to keep our eye on the ball here. He opened and has taken the position consistently until we started taking evidence, that the defendant's story is nonsense, that he is defending this case on the basis that the cop was lunged at with arms outstretched, and that the cop was put in imminent fear of deadly physical force being used against him.

THE COURT: I haven't heard, that was may be the opening, but I haven't heard any evidence to that.

MR. BREITBART: The memo book is in. The reports are in. They are all in. That is the theory of defense here. Now to come up with (1170) a specious argument that it's okay to shoot this kid in the back in the bottom of the stairs if you don't believe the cop was lunged at, is not the purpose of a lawsuit, it is disingenuous if that is going to be the argument based upon admissibility. The lines were very, very clearly

drawn. We are saying he was shot in the back at the bottom of the stairs he was saying—

THE COURT: I understand that. That is not what I am dealing with. I have to deal with what the law is, and I will follow Garner, no question about it.

The question also is that the case is going to depend on who they believe, the police officer's version of where he was shot and what the perpetrator did, or they will believe he was shot fleeing down the bottom of the stairs. The jury is going to make that decision.

And if they believe the version that he was shot at the bottom of the stairs, plaintiff is going to recover under Garner. That is the way I see the case. Maybe you will change my mind. If he was shot on the landing as the police officers say, it may be different.

(1171) MR. BREITBART: Judge, can you reserve decision on this until tomorrow? Maybe we can agree on it. But I feel bad after four days that the jury is sitting there for an additional hour.

THE COURT: All right, I will reserve decision.

Are you going to be referring to the '86 rules and regulations?

MR. KUZMACK: Not today.

THE COURT: All right, then I will reserve decision.

Is there anything else?

MR. BREITBART: He tells me there is a videotape.

MR. KUZMACK: We will be offering a videotape, your Honor, this afternoon after a witness testifies. We can show it to your Honor beforehand.

THE COURT: How long is it?

MR. KUZMACK: Ten minutes.

THE COURT: What is it?

MR. KUZMACK: It's a tape taken on February 1st of Bernard McCummings outside, going (1172) out of his house and going around the block.

THE COURT: Have you seen this tape?

MR. BREITBART: No.

THE COURT: Then we will have to play the tape.

MR. BREITBART: Is this the first witness you are going to call this afternoon?

MR. KUZMACK: Yes.

THE COURT: I thought it was about the subway station?

MR. BREITBART: That's what he had told us previously.

MR. KUZMACK: I have tape of the subway station that I am going to be offering later.

THE COURT: Let the record show that a videotape is being shown by the defendant. Perhaps, counsel, you can just in your own comments state what we are seeing. I don't know what we are seeing. I see a railing and a window.

MR. KUZMACK: I believe that is Bernard McCummings behind the fence sitting in his chair outside the house.

MR. BREITBART: Is there any cutting or

* * *

(155)(1646) *Proceedings*

I have an application to make.

THE COURT: Yes, I understand that.

Members of the jury, we are going to recess and we are going to ask that you return here on Wednesday morning, say, about ten o'clock. And during Wednesday, we will have, as I understand it, summations and my instructions to you on the law, and then the case will be submitted to six of you to begin deliberations.

I want the three alternates to also return on Wednesday. We never know what happens. So you are still on this jury and you are to also report, the three alternates plus the six jurors on Wednesday morning at ten o'clock. The case will be submitted to you sometime that day.

In the meantime, do not discuss anything about this case, as I say again, and I am repeating it again, amongst yourselves or with anyone else.

Have a pleasant weekend and I will see you on Wednesday at ten o'clock.

(Jurors leave the courtroom.)

THE COURT: Yes?

MR. BREITBART: Your Honor, my application, at this time, after the evidence that was elicited (156)(1647) during the defendant's case from Sergeant Lennon and from Mr. Rodriguez is to reinstate the second cause of action with regard to training and lack of supervision that was dismissed at the end of the plaintiff's case.

I think we have made out a cause of action with regard to the lack of supervision, with regard to the lack of training, with regard to the appropriate time to fire or not to fire in spite of the fact it wasn't made out according to the Court's judgment at the end of the plaintiff's case.

I would ask the Court to conform those causes of action and submit it to the jury of the proof at the end of the entire case and reinstate that second cause of action.

MR. KUZMACK: I would submit nothing has changed since the ending of plaintiff's case. There has been no testimony elicited by anyone that the training, supervision,—

THE COURT: Lack of training and supervision.

MR. KUZMACK:—that there was any lack of training or supervision.

There was testimony by Sergeant Lennon and, (157)(1648) I believe, Captain Doyle, that there was training, but there was no evidence offered by the plaintiff, or through any witnesses that any of the training or supervision was lacking in any way. There was no standard laid down and no proof of not meeting that standard in either case.

THE COURT: In other words, as I understand it, your position is that there has not been established what standards of training is required, and supervision is required by the Transit Police, or was required by the Transit Police in 1984 and prior to that time—

MR. KUZMACK: And—

THE COURT:—for the use of deadly force.

Is that what you are saying in the use of deadly force?

MR. KUZMACK: Well, in a way, I think—

THE COURT: By the use of a firearm. Put it that way.

MR. KUZMACK: I think what the plaintiff has in evidence are the 1982 rules, and he has got testimony what individual officers did or didn't do in their training. He had no proof of whether that training meets any or fails to (158)(1649) meet any standard put out, no expert coming in and saying there has been a survey of other police forces in 1984 and forty-nine of them reached level A for training and supervision and the Transit Police only reached level E. Therefore, the training and supervision does not meet the standard of care commonly recognized to the practice of police work.

There is no evidence that they didn't meet their own standard of care.

MR. BREITBART: There is evidence, though, that Rodriguez didn't know whether you can shoot or not shoot. He was asked to testify whether or not in 1984 he knew

whether or not you could shoot an unarmed fleeing felon and he was totally ignorant of it.

Now, I don't have to call an expert witness to make out the fact if someone doesn't know whether or not affirmatively or negatively he can't shoot an unarmed fleeing felon, that he was not up to par on the issue, and certainly that the Transit Authority did not properly supervise him so that they would know that he didn't know.

* * *

(165)(1656) *Proceedings*

to any police officer in the Transit Authority for that period of time in the use of deadly force.

MR. KUZMACK: May I just be heard, your Honor?

The second cause of action the plaintiff has written it out in his pleading, "The defendant New York City Transit Authority," Paragraph 15, "its agency, servants and/or employees were negligent in the screening, training and supervision of its employees, and failed to take all necessary and proper steps to prevent the aforesaid occurrence and the defendant was otherwise negligent."

THE COURT: In other words, you are saying based on negligence. The claim is based on negligence. I have not looked—

MR. KUZMACK: That the training and supervision claim is based on negligence, your Honor. There has been no laying out of a standard that was violated.

THE COURT: There has been no evidence presented as to just what the standard would be for the use of deadly force other than what—other then the police guide, the police guideline of '82, the Penal Law 35, and the Federal United States Supreme Court case.

(166)(1657) Now, both plaintiff and defendant have presented to me the fact that all of those guidelines of '82, the Penal Law, all apply to this case.

MR. BREITBART: That is the standard that we are asking you to apply.

THE COURT: And I can't say whether or not based upon that evidence, that standard, as reflected in the statutes, and that Supreme Court decision, there has been any training so far as police officers are concerned in the Transit for the period prior to June 28th and on June 28, 1984.

MR.KUZMACK: I make one distinction, your Honor. On June 28, 1984, there were Transit Police rules in effect.

Now, for purposes of the law of this case, *Tennessee v. Garner* is retroactively applied. But for the purposes of a lack of training and supervision, it cannot be. Because, at the time, they didn't have that in front of them. All they had was for justification 3530 and the T.A. rules.

So, what we are dealing with, as far as the standard goes, is that for the use of deadly force,

* * *

(1664)

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY : CIVIL TERM : PART 23

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index #: 9494/85

80 CENTRE STREET
NEW YORK, NEW YORK
FEBRUARY 27, 1990

Before:

HONORABLE LEONARD N. COHEN, Justice and a jury.

Appearances:

Morris J. Eisen, P.C., Attorney for Plaintiff, 60 Hudson Street, New York, New York 10013, By: David Breitbart, Esq., Maurice Sieradzki, Esq., of Counsel

Wallace Gossett, Esq., Attorney for Defendant, 370 Jay Street, Brooklyn, New York 11201, By: Nicholas Kuzmack, Esq., George Sawaya, Esq., of Counsel

PETER D. KAUFMAN, C.S.R.
Official Court Reporter

(2)(1665) *Proceedings*

(The following occurred in the robing room:)

THE COURT: On the record.

I have two documents as Court exhibits—I think there are two or three—plaintiff's requests to charge; that would be one.

(Received and marked as Court's Exhibit II.)

THE COURT: And I have the defendant's requests to charge, as Court Exhibit III.

(Received and marked as Court's Exhibit III.)

THE COURT: With respect to Plaintiff's requests to charge, 1:22—

MR. SIERADZKI: If you disbelieve one part of his testimony, you may disbelieve his entire testimony, Judge.

I think both of us requested that that be charged.

THE COURT: Apprehension by use of deadly force—apprehension by the use of deadly force is subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution, I decline to charge as requested.

I will be charging reasonableness, the basis for finding justification or lack of justification of the shooting, reasonable belief on the (3)(1666) part of the police officer, but I will not be charging or making a reference to the Fourth Amendment of the United States Constitution.

The reason is that I do not believe it's necessary to give the jury an instruction as to the reasoning behind the law that I'm instructing them on, or the basis of the law.

Three, reasonableness is to be determined by balancing an infringement of the individual's interest caused by the police action against the governmental interest served by that action.

I decline to so charge.

I believe that that, too, is the rationale that may be used for the law, which I will be charging, and that is that it's the reasonable belief by the police officer of the totality of the circumstances that confronted him at the time of the shooting and immediately prior to the shooting which governed.

I take it you have exceptions to it?

MR. BREITBART: Of course.

THE COURT: The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.

(4)(1667) It is not better that all felony suspects die than they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

It then goes on and ends—doesn't end, but it goes on to state that the New York State Statute, Penal Law Section 3530 is unconstitutional insofar as it may be interpreted to authorize the use of deadly force against such fleeing suspects.

I'm not prepared to instruct the jury as to that.

In fact, I intend to charge Penal Law Section 3530, in terms of its relevant provisions, as it affects the facts in this case.

I decline to charge as set forth in this request, about the use of deadly force being constitutionally unreasonable.

I will charge that the Supreme Court has held that the use of deadly force, generally, against a felon who is fleeing from a crime is—I think the *Garner* decision states that it is unreasonable under the law—then I will go on to state what (5)(1668) the law is in the *Garner* decision, which governs this case, as does Penal Law 3530—that if a suspect or any person who commits any offense threatened the officer with the weapon or deadly weapon or any—or otherwise with imminent physical force, serious physical force, that the use of deadly force is justified—or that if the use of deadly force is justified, if the police officer reasonably believes that a felon has committed a crime involving the infliction or threatened infliction of serious physical harm, and that the officer reasonably believes that such level of deadly force is necessary to prevent an escape from custody, and where feasible, a warning is given—that, generally, is what I would be charging and would be charging also because that's expressed in 3530—I think the same thing is expressed in 3530.

3530 does give instances where—it gives three instances where that can be used, where a person has committed an offense.

Those three instances are if the offense is a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; (6)(1669) or the felony—excuse me—or the felon, in the course of resisting arrest or attempting to escape from custody, is armed with a fire arm or a deadly weapon; or regardless of any offense, the use of deadly force is necessary to defend the police officer or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force.

The section says that; that's what the section says.

MR. KUZMACK: Are we reading from 3530?

THE COURT: That's what the section says.

MR. KUZMACK: 3530, your Honor?

THE COURT: I'm reading subdivision C.

MR. KUZMACK: (Referring.)

THE COURT: That's not what *Garner* says. *Garner* says serious physical harm. I think I will state that it can be deadly physical force or serious physical harm.

MR. KUZMACK: Your Honor, I would submit that if we're going to be charging A-1, that you really don't need to charge C, because there is no—C really refers to any offense, which could include a traffic violation, misdemeanor or a felony;

* * *

(11) *Proceedings*

(Discussion off the record.)

THE COURT: On the record now.

With respect to six—

MR. BREITBART: Six is also in toto, Judge. I don't know—

THE COURT: I want to deal with one thing at a time.

There, in the first sentence, you indicate that if they should find that Rodriguez shot the plaintiff and Wise, as both of them lunged at him, thereby putting him in imminent fear of death—or serious physical injury—then you must find in favor of the defendant.

I am asking you now whether or not there would be an issue of fact as to whether or not the lunging, where he reasonably believed that by their lunging at him, he was put in imminent fear of death or serious physical injury—is that an issue of fact?

MR. BREITBART: Absolutely. He didn't testify to that.

MR. KUZMACK: Your Honor, I believe what the jury has to decide is whether it was reasonable for the officer to be in fear at that point as well (12) as—

THE COURT: That's what I'm saying, what he reasonably believed—that by the lunging, that he was in imminent fear of death or imminent physical injury, as defined.

If they so find, then they would find in favor of the defendant.

However, if they should find that the lunging did not—that he unreasonably believed—unreasonably believed—that the lunging placed him in imminent fear of death or serious physical injury, then they would then have to consider that—what would they consider, then?

MR. KUZMACK: Your Honor, I would submit that if they believed that these two guys lunged at him, that that, in and of itself, is enough for them to assume that it was reasonable for him to believe he was in physical—serious physical danger.

THE COURT: I disagree with you.

I think that it is still an issue of fact as to the jury.

But I'm saying, let us assume they find that the police officer unreasonably believed that he was placed in imminent fear of death or serious (13)(1676) physical injury, by the lunging, then, in that event—

MR. SIERADZKI: Then the use of deadly physical force was unjustified, no justification for the use.

THE COURT: For that—

MR. SIERADZKI: Under the scenario.

THE COURT: Yeah.

MR. KUZMACK: Obviously, I object to that.

MR. SIERADZKI: That was your position—I mean, all along, you were saying, using the lunging as justification for use of deadly physical force, because it put the police officer in imminent fear of harm.

That's consistent with what you've argued.

I don't understand why you're objecting now that the Judge puts that into his charge.

MR. SAWAYA: I don't think that the lunging can have any other reasonable—I don't think that anyone could find that if they lunged at him, he could have any other feeling under those circumstances except fear of physical harm.

THE COURT: I cannot tell you how the jury will feel. It's an issue of fact.

(14)(1677) MR. SAWAYA: A jury is still limited by—you still have to have a rational finding.

I don't think it would be rational to find that they lunged at him without putting him in fear.

MR. BREITBART: But you put evidence in that he became afraid.

MR. KUZMACK: He stated that he did.

MR. BREITBART: They were afraid that they were going to grab his gun or something.

THE COURT: At any rate, there was evidence—if they find again that he was unreasonable in his belief that he was

placed in imminent fear of death or serious physical injury by the lunging, then, in that event, the shooting was unjustified for that reason.

They would have to then go on to determine whether—well—to determine whether or not they believed the plaintiff's story, that he was shot in bottom of the stairwell and as to whether or not he reasonably believed that there was a forcible felony having been committed, and that in order to prevent escape and to effectuate an arrest, to determine whether the police officer reasonably believed that he was in deadly fear, that shooting (15)(1678) him in the stairwell was necessary.

MR. KUZMACK: Respectfully except to that, your Honor.

THE COURT: The balance of six is if, on the other hand, if you find that the officer fired his weapon while he was fleeing, after having committed a robbery, one of the bullets struck him in the spine, at the bottom of the steps, unarmed posed no significant threat—the police officers or a third person—you must find in favor of the plaintiff.

I deny to charge as requested.

I do not believe that that is the law. I believe, as I stated off the record, and I believe in part on the record, that if they should believe that plaintiff was shot in the back, at the bottom of the steps, and they disbelieve Police Officer Rodriguez's testimony of how and where the shooting occurred, then, in that event, it is for them to determine whether Police Officer Rodriguez acted with a reasonable belief that a forcible felony had been committed or attempted to have been committed and whether he reasonably believed that it was necessary to use the level of deadly force by shooting (16)(1679) the plaintiff in the back, at the bottom of the stairway, and to have given a warning before shooting, if feasible.

MR. BREITBART: And at this juncture, you'll read the guidelines?

THE COURT: I would be reading the guidelines probably before. I will be reading the guidelines, and I'll be reading 3530 as well as *Garner* before then.

MR. BREITBART: When you say you find for the plaintiff, find for the defendant—

THE COURT: I will do it—I will not do that up front; I will first read what the law is.

MR. BREITBART: I don't understand the scenario, then whereby on 6-B you're going to indicate that they must find in favor of the plaintiff.

THE COURT: I'm not saying that. I'm denying that request.

MR. BREITBART: I understand that. But you have just now rephrased it.

THE COURT: Yes?

MR. BREITBART: I just don't understand how the defendant can make no contentions, plead this case on the basis of lunging, and then be the beneficiary (17)(1680) of the Court's charge that if you don't believe our witness and you believe that the guy lied and you believe that there was a cover up, you still find for the defendant, because of some other reason.

THE COURT: Because of the law, because under the law—

MR. BREITBART: If it's only an issue of law, then the Court should have decided that, Judge. That's not the basis here. They must comply in the conjunctive with *Garner*, with 3530 and with the guidelines.

THE COURT: I agree with you.

MR. BREITBART: If they don't comply in the conjunctive with all of those three elements, then they must find for the plaintiff.

THE COURT: I will charge them as to *Garner* and P.L. 3530.

MR. BREITBART: And then the guideline?

THE COURT: As well as *Garner*—and I've read it already, on the record. I don't want to repeat it—except, I will state that one of the justifications for the use of deadly force under 3530—I have to repeat it—is if the offense is (18)(1681) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person, deadly force is justified.

I have added the scenario that assuming they disbelieve Rodriguez and they believe the plaintiff, that he ended up at the bottom of the stairs and was shot in the back, that in that event, that the officer also has to have a reasonable belief that such level of force was necessary.

MR. BREITBART: Right.

THE COURT: It goes back—you may disagree with me on that, but that's the way I'm going to charge it.

MR. BREITBART: (Referring.)

THE COURT: (Referring.)

So that's what I'm saying.

I'll deny the charge as requested in the last sentence of request six.

With respect to seven, I will deny such a charge.

I deny charging as requested, because it related to some cover up, and then I have to charge them—a request that I charge a cover-up story, (19)(1682) designed to justify an improper shooting, and that they may infer that this was, therefore, a result of consciousness of guilt on the part of the defendant and infer that this was a shooting outside the standards of propriety.

I deny to so charge.

That does not mean that the plaintiff cannot argue, in summation, that based upon the evidence and the inferences

that he draws, if the jury should draw, is that there was some type of a cover up.

You can so argue that in summation.

But the underlying issue here of law is whether the deadly force used was justified or unjustified.

That turns on the reasonable belief of the officer on a certain set of circumstances that confronted him that day.

With respect to defendant's requests to charge, I will charge everything here, except 1:75.

I believe it is cumulative

You have an exception, Mr. Kuzmack, to that.

MR. KUZMACK: As to 1:75, your Honor, it's failure to produce a witness, specifically Nancy McCummings, the mother of the plaintiff, who lived (20)(1683) with him and treated him and is a registered nurse.

That's just for the record.

THE COURT: I believe that you would have a right, Mr. Kuzmack, to refer in your summation that they didn't call him because a film was shown, his mother, a nurse, and that she might have been in a better position to shed some light in a material way to evaluate what assistance he needed for home care or nursing care.

You can certainly comment on that in your summation, and certainly Mr. Breitbart can comment on it any way he wishes to, should you raise the subject.

MR. KUZMACK: As to 3:4, your Honor?

THE COURT: I might say that she was subject to subpoena by either side to have appeared.

You could have subpoenaed her and so could Mr. Breitbart have subpoenaed her.

Anyway, as to the balance—

MR. KUZMACK: Your Honor, just on that same 1:75—

THE COURT: It's run out.

MR. KUZMACK:—as to 1:75, I would submit that she be subject to subpoena if she were just his (21)(1684) mother treating him, but the fact that she's a registered nurse puts her in the category of expert witness to some degree.

I believe that changes the request. That's all I wanted to say.

THE COURT: Well, under those circumstances, she could decline to answer any questions that would be put to her under subpoena, if she so chose, unless she were paid by you as your expert, or she could decide to answer your questions. The option really would be hers.

With respect to your request as to 3:4, I will be charging in the manner that I have stated, because I will be referring consistantly to the use of deadly force and not just to a battery as such.

I think, with the use of deadly force, different legal implications arise from just using physical force and justification for physical force.

So in my charge, it may encompass the substance of 3:4, but it's going to be in the context of the use of deadly force and not just physical force, such as a battery.

MR. KUZMACK: Respectfully, your Honor, I (22)(1685) would submit that I took 3:4 directly from the Pattern Jury Instructions and amended it as they state it must be.

I would respectfully point out to the Court that I do use the term "deadly physical force"—

THE COURT: No, you don't.

MR. KUZMACK:—in the second paragraph of 3:4.

THE COURT: You do not use "deadly physical force."

For instance, "One who seeks to make a legal arrest of another person lawfully in his custody has the right to use as much force as he reasonably believes necessary in order to

either make the arrest or prevent such person's escape and can be held civilly liable for such a use of force only if the force used was excessive."

This deals with physical force, not necessarily deadly force, and the P.J.I. makes quite clear the charge has to be modified if it's deadly force.

In addition to that, proceeding with respect to your request in the second paragraph, or the third paragraph down: (23)(1686) "In taking into consideration all of the circumstances," that paragraph of your request you refer— "then defendant was not justified in using force at all, and your verdict would be for the plaintiff"—and then you go on to say, "On the other hand, under certain circumstances, he was justified in using force to the extent that he reasonably believed it necessary to make the arrest to prevent the escape."

I believe that this is very confusing for the jury, because it does not refer to deadly force and it may just refer to just the use of physical force, but deadly force is an entirely different matter.

MR. KUZMACK: Respectfully, your Honor, the second paragraph, "Plaintiff claims that defendant, while plaintiff was attempting to escape, used excessive force in using deadly physical force, causing him to sustain two bullet wounds, one below the left shoulder," et cetera—

THE COURT: I will be stating that; that's one of the plaintiff's claims.

MR. KUZMACK: But your Honor, I would suggest that if the criticism of my request to charge is (24)(1687) that I don't specify deadly force, that can be replaced quite easily.

THE COURT: Well, I will be charging the use of deadly force. I will be charging it with respect to 3530, because it pinpoints it, right on the button.

I will be charging *Garner,* which pinpoints it right on the button—and also the guidelines.

MR. KUZMACK: As to the guidelines, may I address that?

THE COURT: Yes.

MR. KUZMACK: I would respectfully ask the Court to re-read *Caputo* and *Crosslind*—both of those cases are versus the Transit Authority—and—

THE COURT: Do I have them?

MR. KUZMACK: I've given them to your Honor, when I was arguing against the 1986 guidelines.

I don't have the copies with me today.

THE COURT: Which ones, *Crosslind* and *Caputo*?

MR. KUZMACK: Yes, your Honor.

THE COURT: (Referring.)

(Short pause.)

MR. KUZMACK: They both stand for the propo-

* * *

(31)(1694) *Proceedings*

THE COURT: What interrogatories are your requesting?

MR. KUZMACK: I would request a question as to whether they found that the officer was lunged at and fired as a result of that.

THE COURT: What else?

MR. KUZMACK: Whether they found that the plaintiff was at the bottom of stairway PL-6; and that the officer fired from the landing, as he attempted to escape.

THE COURT: And what? Attempted to escape?

MR. KUZMACK: And that he fired as he attempted to escape.

THE COURT: All right.

MR. SIERADZKI: Those are the two factual issues.

THE COURT: You gave me three: lunged at, that the plaintiff was found at the bottom of the stairway—

MR. BREITBART: Those are not predicates for the determination of justifiableness or not; that's just what we were trying to avoid, to pigeon-hole the jury—your question, Judge, asked them the question whether it was—whether that was (32)(1695) necessary—

THE COURT: It's like asking whether it was negligence or not. You don't put to them questions like where was the car, where did it end up, where was the driver, where was he preceeding—

MR. KUZMACK: Respectfully, your Honor, for purposes of appeal, if we know that the jury disbelieved the officer and believed the plaintiff's story in its entirety, then the focus of appeal will be whether, because the officer had reason to believe that a forcible felony was being committed, whether he was justified in shooting or not.

THE COURT: Are you saying, then, that there should be another question posed: Did they believe that the police officer believed—what, a forcible robbery—you're giving me four now, instances.

MR. KUZMACK: Yes.

THE COURT: Anymore? I can think of many, many more—but you may have given me these four.

MR. KUZMACK: I believe those four will probably suffice, your Honor.

THE COURT: I will deny that request and put it to the jury just as we do in any negligence case: Was the defendant negligent in the operation or (33)(1696) control over the motor vehicle?

We don't go into the details. I don't think it's warranted here.

I will be covering it in the charge, after stating what your claims are; I will cover defendant's contention in the alternative, in the event that they believe the plaintiff and disbelieve—it's your contention that you're still justified—I will state that that's your contention.

I will deal with it in the law, and also as to how they may find with respect to these alternatives, either way or the other. I will deal with that.

But it will be covered in the charge. So I will just charge that one question: Did Police Officer Manuel Rodriguez use deadly force unjustifiably on June 28, 1984 against the plaintiff, Bernard McCummings?—and then proceed into the damages.

MR. BREITBART: Is my recollection correct, Judge, that you reserved decision on the motion to reinstate the second cause of action?

THE COURT: Right.

MR. KUZMACK: I'm sorry?

* * *

APPENDIX Y—Evidence of Warning.

(149) Q. Just that you observed two male blacks mugging an old man?

OFFICER MEAD: Yes.

Q. What happened next?

A. At that point Officer Rodriguez said "Police! don't move!" And with that he started shooting. He pushed me back. I couldn't see anything at that point, what he was shooting at.

* * *

(323) MR. SANDUSKY: I saw this fellow come kind of running down the stairway, and as I recall he said, "Drop him and freeze."

THE COURT: He said what?

THE WITNESS: "Drop him and freeze." Because he apparently saw that they were choking me and I guess the reason he came down is because he must have heard me.

* * *

(27)(1517) OFFICER RODRIGUEZ: Now, as I was walking toward the exit gate to enter the subway, I heard screams of "help, help," and like a man was being choked.

I ran immediately down the stairs. I had my revolver in my hand, my right hand, with the newspaper covered over it. I had my finger out of the trigger so, accidentally, I could not shoot it. And I went downstairs, down the stairs to see what was happening.

As I approached down on the landing between the two stairs, when I got there, I observed that the two males, two male blacks that we had observed earlier was there along

with the third one up on top of the stairway. They had an old man on the ground. One of them was choking him around the neck and he appeared to be almost dying. The man was red in the face and he was screaming for help.

Now, it was Mr. Wise who was on the right hand that was choking him. The man was on the ground. And Mr. McCummings was on his left going through the man's pockets, taking out his belongings and throwing them on the floor. (28)(1518) There was all kinds of stuff on the floor, change and keys. Mr. Sandusky's glasses were on the floor at the time.

Now, when I reached the landing there, I had my gun. I took the paper and I threw it over the gun. I pointed the gun toward the right-hand side and I said, "Police, Don't move" to the two culprits.

* * *